87-654

(1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW ENERGY COMPANY OF INDIANA,
Appellant,

v.

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO, and SOUTH POINT ETHANOL,
Appellees.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Prior to 1985, Ohio granted a credit to the motor vehicle fuel tax for gasohol, which is a 90-10 blend of gasoline and ethanol. On December 20, 1984, Ohio amended the statute, effective January 1, 1985, by denying the credit to gasohol containing ethanol produced in another state, unless the producer state grants at least as high a credit to gasohol sold there containing ethanol produced in Ohio.

The following questions are presented by this appeal:

1. Does the Commerce Clause allow Ohio to insist on such forced reciprocity even if, as the trial court found, its practical effect is to bar and/or remove from the Ohio market ethanol produced in those states that choose not to give such a credit?

2. Is a reciprocity provision enacted for the purpose of promoting domestic industry and to induce other states to grant reciprocal tax credits consistent with the Commerce Clause?

3. Is the reciprocity provision constitutional because at least some of the ethanol produced outside Ohio is eligible for the tax credit and can enter the Ohio market, even though because of that provision, ethanol produced in many other states cannot?

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JURISDICTIONAL STATEMENT

Appellant New Energy Co. appeals from a final order of the Supreme Court of Ohio, on rehearing, rejecting a challenge to Ohio Revised Code 5735.145(B), an amendment to the Ohio motor fuel tax enacted December 20, 1984 and effective July 1, 1985, which amendment conditioned the grant of a credit to such tax for gasohol containing ethanol produced in a state other than Ohio, on the availability of a similar credit for Ohio-produced ethanol in such other state. The Supreme Court of Ohio held that the statute did not violate Article I, sec. 8, cl. 3, the Commerce Clause, of the United States Constitution.

OPINIONS BELOW

The opinion of the Ohio Supreme Court on rehearing is reported at 32 Ohio St. 3d 206, and is reprinted at Appendix 1a. The original decision of the Ohio Supreme Court has not been reported and is reprinted at Appendix

20a. The opinion of the Tenth Appellate District of the Court of Appeals of Ohio is not officially reported and is reprinted herein at Appendix 35a. The opinion and decision of the Court of Common Pleas of Franklin County, Ohio is not officially reported and is reprinted herein at Appendix 56a.

JURISDICTION

The Ohio Supreme Court rendered its opinion and entered a final judgment on rehearing on September 2, 1987. A Notice of Appeal to this Court was timely filed with the Ohio Supreme Court on October 9, 1987. This appeal is docketed within 90 days of the rendering of the Ohio Supreme Court's decision and judgment on rehearing, and the jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, sec. 8, cl. 3 of the United States Constitution provides that:

> 1. The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Ohio Revised Code 5735.145(b) is reprinted herein at App. 77a.

STATEMENT OF THE CASE

Appellant New Energy Company of Indiana (New Energy) is an Indiana limited partnership engaged in the business of manufacturing ethanol and distributing it in interstate commerce. Ethanol is a 199 proof alcohol, which is derived from, among other sources, corn. The corn is treated with enzymes that convert the starch into sugar and ultimately into alcohol. Ethanol is mixed with gasoline in a 10/90 percent ratio to form a blend commonly referred to as gasohol. New Energy's production facility became operational in October 1984.

New Energy's ethanol manufacturing plant is located in South Bend, Indiana, and one of its primary markets, prior to the enactment by the Ohio General Assembly of R.C. 5735.145(B), was the State of Ohio. It was then distributing approximately 25% of its output to Ohio and reasonably anticipated that when its new plant reached full production capacity, 35% of its total output would be distributed to Ohio. Prior to the enactment of R.C. 5735.145(B) New Energy was distributing to Ohio fuel dealers in excess of 12 million gallons of ethanol per year. The enactment of the challenged legislative amendment has, for all practical purposes, prevented New Energy from distributing any of its ethanol in interstate commerce from Indiana to Ohio. Intervenor-appellee South Point Ethanol is an Ohio based ethanol facility that competes with New Energy for the sale of ethanol in interstate commerce. It lobbied heavily for the enactment of R.C. 5735.145(B).

As originally enacted in 1981, R.C. 5735.145 granted a credit to fuel dealers against fuel taxes for fuel containing a blend of not more than 10% of ethanol. This credit was granted regardless of where the ethanol was produced. Effective January 1, 1985, the Ohio General Assembly on December 20, 1984 amended that statute, adding subsection (B) which stipulated that qualified fuel otherwise eligible for the credit "shall not contain ethanol produced outside Ohio, unless the tax commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit, or refund from such state's motor vehicle excise tax or sales tax for similar fuel containing ethanol produced in Ohio." It is this January 1, 1985 statutory amendment that is subject to constitutional challenge as being violative of the Interstate Commerce Clause.

The enactment of the challenged amendment has had the practical effect of barring from Ohio any out-of-state ethanol producer located in a state that does not grant

a tax credit to any ethanol producer. Indiana is a state that does not provide such credits to any producers, regardless of state of origin. Thus, dealers who obtain their ethanol from New Energy would be ineligible for the Ohio credit. At all times relevant, the Ohio credit was in the amount of $.25 per gallon of ethanol. The evidence made it quite clear that no ethanol producer could continue to distribute in a state where it was subjected to such a penalty for its home state's failure to provide what Ohio R.C. 5735.145(B) required.

Shortly after the enactment of R.C. 5735.145(B), New Energy filed its Complaint in the Franklin County Common Pleas Court seeking a declaratory judgment that the forced reciprocity tax credit amendment was unconstitutional as violative of the Interstate Commerce, Privileges and Immunities and Equal Protection clauses. Thereafter, New Energy abandoned the Equal Protection and Privileges and Immunities Claims and proceeded solely under the Commerce Clause.

The Franklin County Common Pleas Court tried the case on an expedited basis and heard evidence on March 1, 1985 and March 29, 1985. The trial court decided the case on the basis of that evidence and on the basis of agreed findings of facts submitted by New Energy, the State of Ohio Tax Commissioner, and South Point Ethanol. The trial court found this to be "a very close case", but held that R.C. 5735.145(B) did not violate the Commerce Clause of the United States' Constitution because of a strong presumption in favor of constitutionality. The trial court further found that "the legislature's purpose of promoting domestic industry and to affect the policies of other states to grant reciprocal tax credits, is a legitimate purpose—at least debatably". It further found that "in all likelihood, no dealer will purchase plaintiff's product because it is not subject to the tax credits." This decision of the trial court was affirmed by a 2-1 split

decision of the Tenth Appellate District of the Court of Appeals.

When the appeal came before the Supreme Court of Ohio, it rendered an opinion on December 26, 1986, which reversed the Court of Appeals and declared R.C. 5735.145 (B) to be violative of the Commerce Clause of the United States' Constitution. The Supreme Court of Ohio reached that decision by a 4-3 vote. However, 2 of the justices in the majority (Chief Justice Frank J. Celebrezze and Justice Clifford Brown) failed of reelection and were replaced in January, 1987, by Chief Justice Thomas Moyer and Justice Herbert Brown. South Point Ethanol filed a Motion for Rehearing. None of the justices who concurred in the majority opinion declaring this legislation violative of the Commerce Clause voted for the rehearing. However, the three justices who dissented from the December 26, 1986, opinion, were joined in voting for the rehearing by newly elected Chief Justice Moyer, who was not a member of the Court when the case was originally argued or decided.

On January 21, 1987, the newly constituted court granted rehearing of this case as well as many others, vacated the earlier decision, and ordered publication of the original opinion withheld. New Energy moved for reconsideration on the grounds that Chief Justice Moyer was not qualified to move for reconsideration or to join in vacating the earlier decision. The Ohio Supreme Court had a well established precedent of newly elected justices not voting on reconsideration motions affecting decisions of the prior court. Newly elected Justice Herbert Brown honored prior precedents and did not participate in rehearing proceedings.

Shortly after the Motion for Rehearing was granted, press reports appeared raising questions about Chief Justice Moyers' participation in the *New Energy* and certain other cases. The Chief Justice thereupon *sua*

sponte withdrew from the case. A motion by New Energy to cause such withdrawal to be effective *nunc pro tunc* was denied, and the Chief Justice's vote for rehearing remained in force. Thereafter the case was rebriefed and argued before the new Supreme Court. This led to the 4-3 split decision which upheld the constitutionality of R.C. 5735.145(B).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

On rehearing, the Ohio Supreme Court determined that R.C. 5735.145(B), the 1984 amendment to the Ohio gasohol tax credit statutes, did not violate the Commerce Clause. The Ohio Court concluded that the amendment was "not protectionist in either its purpose or effect," App. 4a. The Court did find "the issue of forced reciprocity . . . a thorny problem," because such statutes are subject to "the strictest scrutiny," but it concluded that the statute was nevertheless constitutional because "here [t]here is no bar, direct or indirect, on interstate commerce." App. 8a, 11a.

Other objections to the amendment were dismissed with the conclusion that "R.C. 5735.145 is not protectionist and is not unreasonably burdensome on interstate commerce. It does not give an advantage solely to Ohio producers, and does not interfere with the flow of ethanol into Ohio by out-of-state suppliers." App. 8a-9a.

On all three issues—reciprocity, protectionist purpose and burdensome effects—the Ohio Supreme Court erred, and in a manner that conflicts with numerous decisions of this Court.

I. The Ohio Supreme Court's Decision On Reciprocity Conflicts With The Decisions Of This Court.

The Ohio Supreme Court's discussion of reciprocity opens somewhat ambiguously with a concern that if Ohio's reciprocity statute is struck down, then so will the

reciprocity statutes of "about thirty states." App. 8a. Apart from the fact that only a few states have *reciprocity* statutes—the rest give credits but do not exact reciprocity—the constitutional significance of this is unclear since "about thirty states" have no more of a right to discriminate and force reciprocity on the other twenty, than one state may wish respect to the other forty-nine.

This is obviously a minor aspect of the Court's discussion. The essence of the Ohio Supreme Court's decision on reciprocity appears in its observation that:

> "the bulk of ethanol and gasohol sold in Ohio is obtained primarily through interstate commerce, whereby ethanol is shipped into Ohio from Illinois and Tennessee. Thus, New Energy's inability to compete in the Ohio market will not affect the flow of ethanol through inter-state commerce into Ohio." App. 9a.

But this Court has said many times that there need not be a complete ban on all out-of-state business, either with respect to the number of out-of-state competitors affected, or with respect to how severely a particular business is disadvantaged, Ohio has no more right to discriminate against businesses from another state than did North Carolina in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977), Mississippi in *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976), or New York in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

Indeed, this Court explicitly noted in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970), that only one company, and not the entire industry was affected. In *Hunt*, the impact on the products of only one state—Washington—was at issue; in *Lewis v. BT Investment Mgrs., Inc.*, 447 U.S. 27, 32, 39-40 (1980), the statute was actually aimed at only one company. And in *Great*

A&P Tea Co., Louisiana milk was largely[1] excluded, but some eight states had reciprocity agreements with Mississippi and milk companies from those states were able to come into Mississippi. *See* Brief of Appellee in *Great A&P Tea Co. v. Cottrell* 6-7. *See also Miller v. Publicker Industries, Inc.*, —— Fla. ——, 457 So. 2d. 1374 (Fla. S. Ct. 1984) (foreign producers excluded, but not domestic out-of-state companies).

Despite the presence of some out-of-state competitors or the ability of some out-of-staters to compete on an equal basis with in-staters, the Court has nevertheless insisted on "the strictest scrutiny" for forced reciprocity provisions, *see Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982), as the Ohio Supreme Court recognized. This is because it is the creation of just such preferential trade areas, in which firms from other states may enter but only in return for favorable treatment for the in-stater in those other states, that this Court has frequently warned against. *See, e.g., Great A & P Tea Co.*; *Dean Milk Co. v. Wisconsin*, 340 U.S. 349 (1951). Thus, speculation that other out-of-state producers may pick up appellant's share of the Ohio market, see Court of Appeals opinion, App. 46a, a speculation for which there is no evidentiary support, is constitutionally irrelevant.

In any event, Ohio may not determine which out-of-state business it will let in by insisting on out-of-state benefits for its own producers as a condition of entry.[2]

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[1] Because of a "grandfather clause", even some milk from Louisiana and Alabama which had no reciprocity agreements with Mississippi continued to come in. *Great A&P Tea Co. v. Cottrell*, 383 F.Supp. 569, 572 (1974).

[2] This is one respect in which *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978), differs significantly from this case, for in *Exxon, all* refined gasoline came in from out-of-state, and no out-of-staters were benefitted in return for benefits to domestic business. Whatever benefits accrued to some out-of-staters at the expense of others was purely fortuitous and determined by factors wholly unrelated

Nor is it relevant that in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), *Sporhase*, *Dean Milk*, and *Great A&P Tea Co.*, the "ban" on interstate commerce was in the form of an absolute prohibition on entry, whereas here it is in the form of a discriminatory tax. This Court has recognized no distinction between taxes that make out-of-state entry difficult or impossible, on the one hand, and absolute bans, on the other, but has treated the two forms of barrier identically. *See, e.g., Nippert v. Richmond*, 327 U.S. 416, 426 (1946) where, discussing barriers to entry the Court said, "Nor may the prohibition be accomplished in the guise of taxation, which produces the excluding or discriminatory effect." *See also*, *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984); *Boston Stock Exchange*; *Welton v. Missouri*, 91 U.S. 272 (1876); *Darnell & Sons v. Memphis*, 208 U.S. 113 (1908); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). As Chief Justice John Marshall said over 150 years ago, "The power to tax is the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Here the trial court found, and it is undisputed, that Ohio's forced reciprocity amendment has a "major impact on its [plaintiff's] business in Ohio . . . [for] in all likelihood, no dealer will purchase plaintiff's product because it is not subject to the tax credit" App. 58a, 62a; see also the Ohio Supreme Court's reference to "New Energy's inability to compete in the Ohio market." App. 9a. As the dissent below observed:

> In numerous cases, the United States Supreme Court has invalidated discriminatory state taxes without

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to the well-being of domestic competitors, for there were none. *See Lewis v. BT Inv. Mgrs., Inc.*, 447 U.S. at 42 (no discrimination "among affected business entities according to the extent of their contacts with the local economy.") Here, the determination of which out-of-stater benefits is related entirely to the benefits to the local competitor.

requiring that they be so drastic as to erect an impenetrable barricade to commerce at the state border. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange, supra.*[3]

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[3] State regulations, as opposed to taxes, also need not effect a total ban upon importation to impermissibly burden or discriminate against interstate commerce. *See Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977), wherein the Court invalidated a facially neutral North Carolina statute requiring closed containers of out-of-state apples to bear no quality grade markings showing other than the applicable federal grade. Such regulation plainly did not completely ban the importation of out-of-state apples, but it did put their growers at a competitive disadvantage.

App. 17a-18a. Such a "competitive disadvantage" on some out-of-state businesses is enough to condemn a statute.

Nor is it relevant how great the disadvantage. As this Court said in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407 (1984):

> When a tax, on its face, is designed to have discriminatory economic effects, the Court "need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, 451 U.S. [725] at 760.[13]

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[13] The extent of the discrimination does not affect our analysis.

In other respects as well, the Ohio Supreme Court's reasoning and decision are inconsistent with this Court's unanimous decision in *Great A&P Tea Co.* Some of these aspects will be explored in detail below, but these points may be noted here:

- In both cases, the out-of-state competitor was injured because the statute a issue makes eligibiliy for enry dependent on what the out-of-state *legislature* does, a

matter beyond the affected businesses' power. In *Great A&P Tea Co.*, the A & P Co. tried to get Louisiana to enter a reciprocity agreement but failed, 424 U.S. at 369 n.4, and here, New Energy has "no power to demand that [Indiana] enter into a reciprocity agreement with" Ohio, *see Great A&P Tea Co. v. Cottrell*, 383 F. Supp. 569, 573 (D. Miss. 1974) (3 judges) and adopt a motor vehicle fuel tax credit equal to Ohio's.

- In both cases, the courts upholding the statute seemed to be blaming the adverse effect on the foreign state. Thus, there are hints in the lower court opinions and even in the Ohio Supreme Court that Indiana did something wrong or blameworthy in abolishing the tax credit and in providing a small temporary subsidy to ethanol manufacturing facilities, *compare Great A&P Tea Co.*, 383 F. Supp. at 575 n.2, *with* App. 9a; 45a-46a; 65a, a subsidy which was eliminated as of July 1, 1986, and no longer exists. The legitimacy of this subsidy is, of course, not at issue here and in any event, as this Court ruled in *Great A&P Tea Co.*, if a state does do something another state considers wrong, the recourse is not economic reprisal, but a law suit. 424 U.S. at 379-80.

- In both cases, a specious health argument was presented. It was rejected in *Great A&P Tea Co.*, for, as here, the statutory provision in question actually militated against the purported improvement in health conditions, see point II below, thereby exposing the meretriciousness of the claim.

Most importantly, both cases rely on the danger of "balkanization" of the national economy, of retaliations and reprisals, that the Court in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Great A & P Tea Co., Dean Milk, Hughes v. Oklahoma, Boston Stock Exchange*, and

elsewhere has warned against. In *Armco, Inc. v. Hardesty*, the Court also insisted that a tax have "what might be called 'internal consistency—that is, the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade." 467 U.S. 638, 645 (1984). *See also Tyler Pipe Industries v. Washington State Dept. of Revenue*, 107 S.Ct. 2810, 2820 (1987); *American Trucking Ass'ns, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987). Here, if reciprocity were insisted upon by every state, free trade areas would be created in which only those businesses whose state gave exactly the same amount of tax credit to out-of-staters would be able to compete fully in each other's states. Thus, if Indiana gave no credit, Illinois gives only a 1¢ credit, and Ohio and Kentucky each give a 4¢ credit, then (1) Indiana businesses are at a competitive disadvantage in the other three states; (2) Illinois businesses would be able to compete on an even basis only in Indiana and Illinois; and (3) Ohio and Kentucky businesses will have an advantage in the Ohio and Kentucky markets. *See also Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 72; *Columbia Steel Co. v. State*, 30 Wash. 2d 658, 662-64 (1948), cited in *Armco v. Hardesty*, 467 U.S. at 645 n.8.

Thus, the actual effect of the Ohio reciprocity provision would "depend on the shifting incidence of the varying tax laws of the various states at a particular moment." The effect of Ohio R.C. 5735.145(B) on Indiana producers would have been different in 1983, when Indiana gave a credit, from what it was in 1984, when Indiana did not, and the effect on Illinois producers is different now that Illinois has reduced its credit, from what it was before the reduction. "The immunities implicit in the Commerce Clause and the potential taxing power of a state could hardly be made to depend, in the world of practical affairs, on such variable relationships." *Freeman v. Hewitt*, 329 U.S. 249, 256 (1946); *Armco v. Hardesty*, 467 U.S. at 648; *Tyler Pipe Ind. v. Washington State Dept. of Revenue*, 107 S.Ct. at 2817 n.11.

Reciprocity conditions are "explicit barrier[s] to commerce between . . . states," *Sporhase v. Nebraska*, 458 U.S. at 957, and, contrary to the decision of the Ohio Supreme Court, it is irrelevant whether all or only some interstate commerce is affected and whether the provision creates an absolute bar or only a competitive disadvantage. It is thus hardly surprising that of the four public authorities who have analyzed the constitutionality of this type of statute, only the Ohio courts have upheld it and by the slimmest of margins; an Illinois version of this statute was struck down last year, *Russell Stewart Oil Co. v. Illinois*, 85 CH 8959 (Cir. Ct. Cook May 7, 1986), *appeal pending*, and the Attorneys General of Tennessee, and Illinois agree. (App. 68a-77a)

This case is on all fours with *Great A&P Tea Co. v. Cottrell*, except that this case involves a tax and *Great A&P* involved a formal barrier. But that is not a difference that makes a constitutional difference.

II. The Purposes For Which R.C. 5735.145(B) Was Enacted Are Not Consistent With The Commerce Clause.

Although South Point Ethanol and the State have claimed that the improvement of health in Ohio was a purpose of the 1984 amendment, the trial court did not include this among the purposes that it found. Instead, it found two other purposes, both of which are proscribed by the Commerce Clause: "promoting domestic industry *and* to affect the policies of other states to grant reciprocal tax credits." App. 63a (emphasis in original). The trial court considered these "debatably" legitimate, but they are not even that.

"Promoting domestic industry" is a facially obvious purpose of Ohio R.C. 5735.145(B), and the record reinforces that. On its face, the reciprocity provision gives Ohio producers a competitive advantage over foreign-state producers, unless the foreign state assists them in competing there. If the latter state does not surrender

to this pressure on its producers, those producers are at a competitive disadvantage vis-a-vis the local competitor.[3]

The record facts are particularly illuminating on this issue. Intervenor South Point Ethanol, the sole Ohio ethanol producer and a key figure in the enactment of the 1984 reciprocity amendment (See Hearing of Mar. 29, 1985, pp. 38-39, 57, 60; the two hearings will hereinafter be referred to as "Mar. 1 Hg. ——" and "Mar. 29 Hg. ——), has an annual capacity of some 60,000,000 gallons of ethanol, of which 41% were sold in the Ohio market in 1984, or some 22-23 million (id. at 52); its principal owners are Ashland Oil Co. and the Ohio Farm Bureau. New Energy, with approximately the same capacity as South Point, considered Ohio a potential major market and planned to sell approximately 1.7 million gallons a month to wholesalers and retailers in Ohio or about 20.4 million gallons annually (Mar. 1 Hg. 15-16). New Energy thus presented a direct threat to South Point. Indeed, South Point's sales had already begun to fall in 1985, after New Energy, whose production facilities became operational in October 1984 (two months before enactment of RC 5735.-145(B)), came into the market and while New Energy was still eligible for the Ohio credit. (Mar. 29 Hg. 52).

Nor is South Point Ethanol simply another private business to the Ohio legislature. The State of Ohio has a major interest in its success, for the company, which was formed in 1981 when the Ohio economy was seriously depressed, provides 185 jobs in an area with the second highest unemployment rate in the state. It has a payroll of $6 million annually, and it provides additional employment for outside consultants; South Point also buys a great deal of corn from Ohio farmers. (Mar. 29 Hg. 50) Finally, the State of Ohio Public Employees Retirement System has loaned South Point $23.5 million to retrofit and operate its plant. Ohio's "promoting [this particular] domestic industry" is thus very understandable.

[3] They are also at a disadvantage vis-a-vis non-Ohio competitors whose home states do give a subsidy equal to Ohio's, but as noted above, that is irrelevant, for not all out-of-staters need be disadvantaged for the Commerce Clause to be violated.

Such a goal may not be pursued by means that discriminate against out-of-state business, as this Court emphasized in *Bacchus Imports* just a few years ago. There the State of Hawaii tried to assist a "financially troubled" local business (though there is no evidence that South Point is in trouble) and the impact on out-of-state businesses was very small. Nevertheless, the Court reiterated that "States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States. *Guy v. Baltimore*, 100 U.S. 434, 25 L.Ed. 743 (1880)." Indeed, a state may not try to nullify another state's competitive edge by discriminatory taxes that merely seek to "equalize." *Deukmejian v. Nat'l Meat Ass'n*, 734 F.2d 656 (9th Cir. 1984), *aff'd*, 105 S.Ct. 768 (1985) *Armco v. Hardesty, supra*; *General Motors Corp. v. Washington*, 377 U.S. 436, 461 (1964) (Goldberg, J., dissenting) ("A state therefore should not be enabled to put out-of-state producers . . . at a disadvantage by imposing a tax to 'equalize' their costs with those of local businessmen who would otherwise suffer a competitive disadvantage because of the state's own taxation scheme.")

In *Bacchus Imports*, the Court also rejected the argument that Hawaii had no "discriminatory intent," the Court saying, "If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory . . . [for] virtually every discriminatory statute . . . can be viewed as conferring a benefit on one party and a detriment on the other in either an absolute or relative sense." 468 U.S. at 273.

"To affect the policies of other states to grant reciprocal tax benefits," the other judicially determined pur-

pose for the Ohio statute, is equally unacceptable under the Commerce Clause. Ever since *Baldwin v. Seelig*, it has been undisputed that a state "has no power to project its legislation" into another state to force the latter to adhere to the first state's policies. And the record makes clear that this was indeed Ohio's purpose. As witnesses for both New Energy and South Point Ethanol testified, South Point Ethanol, through its General Manager Lauren Hill, was "lobbying heavily for it [R.C. 5735.145(B)] so they would put pressures on Indiana and perhaps on me [New Energy's President] for some number in Indiana for them at the pump." (Mar. 29 Hg. 39). South Point General Manager Hill, who testified for South Point Ethanol at the hearings on the 1984 amendment, confirmed this with the following testimony:

> Q. Basically your support of the reciprocity clause was for the purpose of having Ohio legislation that would put pressure on Indiana to pass legislation?
>
> A. Well, my support of the, including the reciprocity clause with all of these changes was as an incentive to all states to enact all legislation that would promote the sale of ethanol in their states.

Mar. 29 Hg. 60. *See also* id. at 57. Obviously, the "incentive" was the "pressure" created by putting Indiana ethanol producers like New Energy at a competitive disadvantage with Ohio producers like South Point Ethanol in the Ohio ethanol market, unless Indiana did what Ohio wanted it to do.

As this Court said in *Great A&P*, while reciprocity is acceptable, "forced reciprocity" is not. "One state may not put pressure of that sort upon others to reform their economic [or other] standards." *Baldwin v. Seelig*, 294 U.S. at 524. *See also Brown-Forman Distillers v. N.Y. St. Liquor Auth.*, 106 S.Ct. 2080 (1986) (New York cannot force producers in other states to give up their competitive advantage).

In the court below, the State and South Point Ethanol tried to argue that the amendment was passed to increase the use of ethanol and thereby reduce pollution in Ohio. It will be noted that neither the trial Court nor the Court of Appeals accepted this contention, and in the Ohio Supreme Court there is only a passing reference to it, somewhat ambiguously suggesting this as one of the purposes.[4]

The record is barren of any support for this contention apart from a few almost casual references to the advantages of lead-free gasoline. Not only did the trial court and the Court of Appeals almost explicitly refuse to find this as a purpose,[5] but it is patently implausible that this was a purpose. If Ohio wants to encourage the use of ethanol, Ohio would not exclude any ethanol producer from *anywhere*, by denying the credit. Nor would it deny the credit to ethanol businesses whose states have used methods other than a tax credit to promote the use of ethanol. Moreover, Ohio would not insist that any tax credit granted by another state be as high as Ohio's for the other state's ethanol business to avoid being put at a competitive disadvantage in Ohio.

Indeed, if Ohio were really serious about using the credit to encourage the use of ethanol, it would not limit the credit to ethanol made with grain—which is produced in Ohio—and exclude ethanol made from beet or cane sugar, *i.e.*, ethanol not made in Ohio. It would not limit its credit to ethanol made from plants fired with coal—which Ohio mines—or wood and exclude ethanol made

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[4] *See* the passing reference to "Ohio's interest in reducing lead pollution." App. 10a.

[5] The trial court's finding of purposes, quoted above, came immediately after stating appellees' health purpose claim and did not include health among its findings, while the Court of Appeals nowhere mentioned health as a purpose. *See* App. 42a (stating the purposes).

from plants that are gas-fired. And it would not limit the grant to plants with a capacity below 200,000,000 gallons. As the Court noted in *Great A&P*, *Hunt*, *Westinghouse*, and many other cases, the state's argument would be more persuasive if the provision in question actually implemented the asserted policy goal.

Even if there were a legitimate health goal, it must be sought by the "least restrictive alternative," in keeping with "the strictest scrutiny," applicable to such facially discriminatory legislation. *Dean Milk*, 340 U.S. at 354; *Baldwin v. Seelig*, 294 U.S. at 524. As the above paragraph indicates, there are many other ways that are less harmful to commerce to promote the use of ethanol.

III. The Effect Of R.C. 5735.145(B) Is To Burden Commerce Excessively.

Even if, unlike R.C. 5735.145(B), a statute regulates evenhandedly and treats all equally, there may still be a violation of the Commerce Clause if "the burden on interstate commerce exceeds the local benefits." *Pike v. Bruce Church*, 397 U.S. at 142. The only legitimate "local benefits" that are even remotely relevant are health-related, since protecting local industry at the expense of interstate commerce, or trying to force other states to provide benefits to that local industry, are each illegitimate purposes. Here, the burden far exceeds any possible benefit for the reasons discussed earlier.

The Ohio Supreme Court sought to buttress its conclusion that there was no excessively harmful effect on commerce by positing a hypothetical case in which Ohio R.C. 5735.145(B) was enacted, even though no Ohio firm produced ethanol. In that case, all the ethanol would come from out-of-state firms entitled to the full discount and "producers from states without a reciprocal program would, as appellant, still be at a disadvantage"—an admission, incidentally, that the statute does disadvantage

appellant. If an Ohio producer then enters the market, it is on an even basis with the other competitors in the market, and such "identity of treatment for in state and out-of-state producers is the very essence of the Supreme Court's standard for 'evenhandedness.'" App. 8a.

Hardly. Apart from the rather dubious premise that such a statute would be passed if there were no Ohio producers to benefit (the trial court found, of course, that the very purpose of the statute was to benefit an existing Ohio producer) the Ohio Supreme Court's logic would explain away every reciprocity cases like *Great A&P Tea Co.*, as well as other cases such as *Hunt*, *Lewis v. BT Inv. Mgrs., Inc.*, and *Baldwin v. Seelig*, where a state discriminates against some but not all interstate commerce. Thus, if there were no North Carolina apple growers, only Washington apples would be at a disadvantage and apples from other states outside North Carolina would occupy the market on an even basis with North Carolina's apples when the latter enter the market. Similarly, if there were no Mississippi milk producers, milk from states that accept the reciprocity condition would come into Mississippi, but not milk from those states like Louisiana and Alabama that had refused to do so, and when Mississippi started to produce milk, producers from the first group of states would be treated the same as Mississippi producers. And finally, if there were no milk producers in New York, producers from states where the milk was priced no lower than New York's price floor would occupy the New York market, and the subsequent entry of a New York producer would also treat them all "evenhandedly."

The fallacy in the example is, of course, the unrealistic assumption that a statute geared to the existence of a domestic producer and explicitly designed to assist such producers when selling in other states (apart from any purpose in protecting the local market) would be applied in a situation where there is no local producer. In this

respect, Ohio R.C. 5735.145(B) differs from the statute in *Exxon v. Maryland* which *was* passed in the abence of any Maryland competitor and was in no way designed to help *local* stations as opposed to non-refiner or producer-owned stations. Indeed, it has been pointed out that the very same statute was enacted in states where there were local refiners or producers who were thereby forced to give up their stations. *See* Note, *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 66, 71 n.40 (1978).

The statute in *Exxon* was designed for certain legitimate economic purposes in no way related to competition between in-state and out-of-state competitors. Whatever incidental harm there was to commerce was not only minor and fortuitous but probably unavoidable if the service station industry was to be restructured so as to exclude refiners and producers, no matter what their home state, from service station ownerships. The statute therefore met the "least drastic alternative" requirement of *Dean Milk*.

The same holds for *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) and *CTS Corp. v. Dynamics Corp.*, 107 U.S. 1637 (1987), which also involve even-handed treatment that is indifferent to the source of the competing entities. As the dissenting Justice Brown pointed out below:

> "In stark contrast with the statutes [in the above three cases], R.C. 5735.145(B) contains an *explicit* distinction between ethanol produced in Ohio and ethanol produced in states not granting a reciprocal tax credit. R.C. 5735.145(B) is thus plainly discriminatory on its face. Repititious assertion by the majority that R.C. 5735.145(B) regulates 'even-handedly' is no substitute for analysis of the law."

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: October 22, 1987

APPENDIX

APPENDIX

SUPREME COURT, JANUARY TERM, 1987
[32 Ohio St. 3d]

Counsel for the Parties

NEW ENERGY COMPANY OF INDIANA,
Appellant,
v.
LIMBACH, TAX COMMR., *et al.,*
Appellees.

[Cite as New Energy Co. of Indiana *v.* Limbach (1987), 32 Ohio St. 3d 206.]

Taxation—Commerce Clause—R.C. 5735.145—Provision providing a tax credit for out-of-state producers of ethanol if reciprocal tax credit exists for Ohio producers constitutional.

O.Jur 2d Taxation § 231.

R.C. 5735.145 is neither protectionist nor unreasonably burdensome on interstate commerce. It does not give an advantage solely to Ohio producers, and does not interfere with the flow of ethanol into Ohio by out-of-state suppliers.

(No. 86-784—Decided September 2, 1987.)

APPEAL from the Court of Appeals for Franklin County.

ON REHEARING.[1]

The sole issue before this court is the constitutionality of R.C. 5735.145 which provides a tax credit for Ohio

[1] A motion for rehearing was granted on January 21, 1987. The initial opinion in this case announced December 26, 1986 was vacated and publication thereof was ordered withheld on February 25, 1987.

producers of ethanol, and R.C. 5735.145(B) which grants the tax credit to out-of-state producers of ethanol if their state grants a reciprocal tax credit, exemption or refund for Ohio-produced ethanol.

Ohio requires motor vehicle fuel dealers to pay a tax on all motor vehicle fuel sold. R.C. 5735.145 grants a tax credit to fuel dealers who distribute and sell gasoline to which has been added ten percent by volume of ethanol, commonly referred to as "gasohol." The tax credit is twenty-five cents per gallon of ethanol used, thus making the cost of a gallon of gasohol two and one-half cents cheaper.

Appellant, New Energy Company of Indiana, produces ethanol at its plant in South Bend, Indiana. New Energy brought this action to enjoin the Tax Commissioner from implementing or enforcing R.C. 5375.145 on the grounds that it improperly burdened interstate commerce. New Energy claimed that since Indiana does not have a reciprocal ethanol tax credit, it does not benefit from the tax credit under R.C. 5735.145(B), and thus it cannot compete in the Ohio market. New Energy contended the statute discriminates against out-of-state producers, is an unreasonable burden on interstate commerce, and is an attempt at forced reciprocity.

Appellee South Point Ethanol, Ohio's only producer of ethanol, was granted leave to intervene. The trial court denied New Energy the relief it sought, and New Energy appealed to the court of appeals, which affirmed.

The cause is now before this court upon the allowance of a motion for rehearing.

Murphey, Young & Smith Co., L.P.A., David J. Young, Kevin R. McDermott and *Herman Schwartz*, for appellant.

Anthony J. Celebrezze, Jr., attorney general, and *Richard C. Farrin*, for appellees Tax Commissioner and Treasurer of State.

Jones, Day, Reavis & Pogue and *David C. Crago*, for appellee South Point Ethanol.

Patricia M. Wilson, urging reversal for *amicus curiae*, Marathon Petroleum Co.

GREY, J. A state may enact valid legislation which promotes some local interest, and which affects interstate commerce within its borders, but it may not discriminate against interstate commerce or impose unreasonable restrictions on it. The problem in almost all of these kinds of cases is in deciding where to draw the line. In *Boston Stock Exchange* v. *State Tax Comm.* (1977), 429 U.S. 318, the United States Supreme Court in discussing the Commerce Clause stated, at 329:

"* * * the Clause is a limit on state power. Defining that limit has been a continuing task of this Court."

Commerce Clause cases generally involve four types of cases and problems: those directly barring out-of-state goods; those favoring local business over out-of-state goods; those which have the practical effect of barring out-of-state goods; and those which force reciprocity on sister states.

Cases of an outright bar on out-of-state goods are rare, and inapplicable here since R.C. 5735.145 does not bar ethanol produced outside the state.

An issue is presented, however, on whether the statute favors in-state producers, *i.e.*, whether it is a form of economic protectionism. The Supreme Court has regularly and consistently struck down state laws which have as their purpose the protection of local economic interests. In *Baldwin* v. *G.A.F. Seelig, Inc.* (1935), 294 U.S. 511, New York enacted a statute which prohibited the sale of milk produced out of state unless it was sold there at the minimum price set by New York. Seelig, Inc. bought milk in Vermont at a lower price and shipped it to New York, but was threatened with prosecution for

violation of the New York statute. The United States Supreme Court struck down the statute, holding that its only purpose was to protect New York milk producers from out-of-state price competition.

In *Hunt* v. *Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, a similar protectionist statute was voided. Washington had a system of inspecting and grading its apples, equivalent of, or superior to, the federal grades and standards. North Carolina enacted a law which prohibited the sale of apples in containers using the Washington grading system. Under the North Carolina statute apples could be identified only by the federal grade or standard. The clear intent of the statute was to protect North Carolina apple growers from the heavily advertised Washington apple logo, and its reputation for quality. Again, the Supreme Court struck down this attempt at economic protectionism.

R.C. 5735.145 is not protectionist in either its purpose or effect. The tax credit is available to all producers, those in-state and those in states outside Ohio which provide a reciprocal tax credit. To be sure, appellant New Energy is adversely affected by Ohio tax credit policy, but mere adverse effect on the business of one competitor is not sufficient to have a valid statute declared unconstitutional. *Minnesota* v. *Clover Leaf Creamery Co.* (1981), 449 U.S. 456, and *Exxon Corp.* v. *Governor of Maryland* (1978), 437 U.S. 117, are representative of the Supreme Court's decisions.

In *Exxon*, Maryland enacted a statute which prohibited a producer or refiner of petroleum products from also operating retail gas stations. The Maryland legislature felt that during the 1973 oil shortage the refiners favored the company-owned stations over independent retailers. Exxon sued claiming the statute was a burden on interstate companies who were being forced to divest themselves of their retail operations. The Supreme Court dis-

agreed, and pointed out that in-state independent dealers would have no competitive advantage over out-of-state dealers.

The court made the point succinctly:

"If the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market—as in *Hunt*, 432 U.S., at 347, and *Dean Milk* [*v. Madison* (1951)], 340 U.S., at 354, the regulation may have a discriminatory effect on interstate commerce. But the Maryland statute has no impact on the relative proportions of local and out-of-state goods sold in Maryland and, indeed, no demonstrable effect whatsoever on the interstate flow of goods. The sales by independent retailers are just as much a part of the flow of interstate commerce as the sales made by the refiner-operated stations." *Id.* at 126, fn. 16.

In *Clover Leaf Creamery Co.*, the United States Supreme Court cited and followed *Exxon*, at 474:

"In *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), we upheld a Maryland statute barring producers and refiners of petroleum products—all of which were out-of-state businesses—from retailing gasoline in the State. We stressed that the Commerce Clause 'protects the interstate market, not particularly interstate firms, from prohibiive or burdensome regulations. *Id.*, at 127-128. A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominately out-of-state industry to a predominately in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purpose does such a regulation violate the Commerce Clause."

In *Clover Leaf Creamery Co.* the state of Minnesota adopted a law banning the sale of milk in nonreturnable, nonrefillable plastic containers, *i.e.*, the ubiquitous gallon

jug. The debate in the legislature centered around which container, plastic or paper, was the more environmentally sound. The Minnesota Supreme Court in holding the statute to be unconstitutional, found, "* * * in effect, that the legislature misunderstood the facts." *Id.* at 469.

This same point is raised by New Energy, and by *amicus* Marathon, *i.e.*, that Ohio's ethanol tax credit program is not founded on a rational and legitimate state interest. Both conceded that removing lead from gasoline, and thus from the environment, is a desirable health goal, but urge that ethanol is not the only solution. This argument is put clearly by Marathon:

"Quite simply, it is Marathon's position that if today no consensus has yet been reached within the industry as to the health aspects of ethanol, it is implausible to say that the Ohio legislature arrived at such a consensus when it enacted the general ethanol subsidization statute, R.C. 5735.145."

We believe that Marathon and appellant make the same mistake that was made by the Minnesota Supreme Court. The United States Supreme Court noted, in *Clover Leaf Creamery Co.*, at 469:

"The Minnesota Supreme Court may be correct that the Act is not a sensible means of conserving energy. But we reiterate that 'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.' *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963)."

This court makes no decision on the wisdom of R.C. 5735.145, but we do find that its enactment is rationally related to a legitimate state interest. The statute is not "simply protectionism," *Philadelphia* v. *New Jersey* (1978), 437 U.S. 617, and is not void on that ground.

A most recent case is *CTS Corp.* v. *Dynamics Corp. of America* (1987), 481 U.S. ——, 95 L. Ed. 2d 67. In *CTS*, Indiana enacted a statute to protect the sharehold-

ers of Indiana corporations from hostile tender offers. While this case is not directly on point, it does demonstrate the United States Supreme Court's consistent position on evenhandedness, at 84:

"Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. 'The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.' *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 126 * * * (1978). See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471-472 * * * (1981) (rejecting a claim of discrimination because the challenged statute 'regulate[d] evenhandedly * * * without regard to whether the [commerce came] from outside the State'); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 619 * * * (1981) (rejecting a claim of discrimination because the 'tax burden [was] borne according to the amount * * * consumed and not according to any distinction between in-state and out-of-state consumers'). Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce."

Using this same standard we find that R.C. 5735.145 is not protectionist and is not unreasonably burdensome on interstate commerce. It does not give an advantage solely to Ohio producers, and does not interfere with the flow of ethanol into Ohio by out-of- state suppliers.

This can best be shown by considering, hypothetically, what the result would be if Ohio had no ethanol producer. Producers in the states with a reciprocal tax credit pro-

gram would ship ethanol into Ohio and receive the statutory tax credit. Producers from states without a reciprocal program would, as appellant, still be at a disadvantage. There would be no burden on interstate commerce *per se*, but only on *some companies* in interstate commerce. This is not unconstitutional. *Exxon, supra*; *Clover Leaf Creamery Co., supra.*

Now let us hypothecate that an Ohio ethanol producer comes into the market. What would the status of that Ohio producer be vis-a-vis the other companies in the interstate ethanol business? The new Ohio company would receive the tax credit, and a reciprocal tax credit for its sales in other states. This new Ohio producer would be in a position identical to the other interstate reciprocal producers. Identity of treatment for in-state and out-of-state producers is the very essence of the Supreme Court's standard of "evenhandedness."

Simply put, R.C. 5735.145 is neither protectionist nor unreasonably burdensome on interstate commerce.

The issue of forced reciprocity, however, presents this court with a thorny problem. State statutes which are facially discriminatory must be subject to the "strictest scrutiny," *Hughes* v. *Oklahoma* (1979), 441 U.S. 322, and state statutes forcing reciprocal action by other states are also subject to that kind of scrutiny, *Sporhase* v. *Nebraska, ex rel. Douglas* (1982), 458 U.S. 941.

The problem with forced reciprocity is that inquiry must always begin by determining who is forcing whom. About thirty states allow tax credits for gasohol. Most of the states near Ohio have reciprocal tax credit programs, as did Indiana until recently when it adopted a direct subsidy program. New Energy, an Indiana producer located a mere one hundred miles from the Ohio market, now claims that Ohio's reciprocal tax feature is a burden on interstate commerce, and that it cannot compete in the Ohio market. If New Energy is successful

here, R.C. 5735.145(B) will be repealed. In that event, appellee South Point will not be entitled to a tax credit across the Ohio River in Kentucky. South Point would then have a cause of action against Kentucky and its ethanol producers to enjoin them from granting a tax credit. The Kentucky producers would have a cause of action against neighboring states, and so on, until each state's reciprocal tax credit program would fall like a row of dominos.

There is no question that the sovereign state of Indiana has every right to switch from a reciprocal tax credit program to a direct producer subsidy program. If Indiana has determined that a subsidy program is more beneficial for that state, so be it. If because of this policy change an Indiana ethanol producer is put at a disadvantage in maintaining its share of the Ohio market, so be that, too. But a change in one state's policy, or a loss of a company's market share, is simply not a constitutional issue.

It should be remembered that the bulk of ethanol and gasohol sold in Ohio is obtained primarily through interstate commerce, whereby ethanol is shipped into Ohio from Illinois and Tennessee. Thus, New Energy's inability to compete in the Ohio market will not affect the flow of ethanol through interstate commerce into Ohio gas stations.

Contrast this situation with *Hughes, supra,* where Oklahoma banned the shipment of minnows out of state. It was a complete ban; Oklahoma minnows were not allowed entry into interstate commerce. The United States Supreme Court found that preserving wildlife is an important state concern, but noted that the statute did not limit the number of minnows caught but only their sale outside the state. This was described as a discriminatory alternative, most burdensome on interstate commerce. There is no outright ban on interstate commerce under

R.C. 5735.145. In practical effect, since Ohio's need for ethanol far exceeds the production capacity of its sole in-state producer, the reciprocal tax credit program encourages out-of-state producers to sell in Ohio. Interstate commerce is encouraged, and Ohio's interest in reducing lead pollution is promoted.

In *Sporhase, supra*, a landowner had property which straddled the Nebraska-Colorado state line. A well located on the Nebraska side was used to irrigate some of the Colorado land. Nebraska had a statute which prohibited the transport of ground water out of Nebraska into any state which did not reciprocally allow its water to be transported into Nebraska. Colorado had no such reciprocal statute.

The *Sporhase* decision begins by pointing out the important state interest in regulating ground water, particularly in the semi-arid western states, for conservation, equitable apportionment, and the health of the citizenry. The court found, however, that the Nebraska statute was a complete bar to interstate commerce, and not related to those legitimate state interests:

"The reciprocity requirement fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska." *Id.* at 957-958.

In a similar vein, in *Dean Milk Co.* v. *Madison* (1951), 340 U.S. 349, the United States Supreme Court struck down a complete bar to interstate commerce.

In *Great A & P Tea Co.* v. *Cottrell* (1976), 424 U.S. 366, the court followed the "practical effect" concept, *i.e.*, although couched in the language of establishing sanitary standards, the Mississippi regulations had the effect of barring out-of-state milk. The court looked past the supposed health standards and found that the regulation was designed to bar milk, good milk or bad, from nonreciprocating states.

In short, in *Hughes, supra*, no minnows left Oklahoma. In *Sporhase*, no water was transported into Colorado. In *Great A & P Tea Co.*, no Louisiana milk entered Mississippi. We do not have that kind of situation here. There is no bar, direct or indirect, on interstate commerce.

We conclude by pointing out the specific relief sought by appellant here—a permanent injunction against the state of Ohio from implementing or enforcing R.C. 5735.-145. Ohio has elected to promote the use of gasohol by granting a tax credit to Ohio producers of ethanol. Ohio has extended that tax credit to all interstate producers of ethanol who grant a tax credit to Ohio producers. The reciprocal tax credits promote the sale of Ohio ethanol outside the state, and encourage the shipment of ethanol into Ohio; yet, appellant would have us enjoin this as a burden on interstate commerce.

We iterate the maxim in *Exxon*—the Constitution protects commerce, not companies.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

HOLMES, DOUGLAS and WRIGHT, JJ., concur.

SWEENEY, Acting C.J., LOCHER and H. BROWN, JJ., dissent.

SWEENEY, J., sitting for MOYER, C.J.

GREY, J., of the Fourth Appellate District, sitting for SWEENEY, J.

HERBERT R. BROWN, J., dissenting. I respectfully dissent. In my view, R.C. 5735.145(B) impermissibly discriminates against interstate commerce, as was properly recognized by this court on the first hearing of this case.

I

Section 8, Article I of the Constitution of the United States provides that "[t]he Congress shall have Power * * * to regulate Commerce with Foreign Nations, and among the several States * * *." The United States Supreme Court has explained that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States * * *. * * * [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit* (1946), 329 U.S. 249, 252.

Although the power to lay taxes upon interstate commerce is reserved to the states, a state exercising this power must respect the national interest in free and open interstate trade. "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.'" *Boston Stock Exchange* v. *State Tax Comm.* (1977), 429 U.S. 318, 329 (quoting *Northwestern States Portland Cement Co.* v. *Minnesota* [1959], 358 U.S. 450, 458). "The Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co., Inc.* v. *Maxwell* (1940), 311 U.S. 454, 455.

A legitimate legislative purpose does not save a discriminatory statute. As the Supreme Court has made clear: "'[W]hatever [a State's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'" *Hughes* v. *Oklahoma* (1979), 441 U.S. 322, 337, at fn. 17 (quoting *Philadelphia* v. *New Jersey* [1978], 437 U.S. 617, 626-627).

It is against this constitutional standard that R.C. 5735.145(B) must be measured, and against which it cannot be upheld.

II

Ohio law requires motor vehicle fuel dealers to pay taxes on all motor vehicle fuel sold, used or distributed in Ohio. See R.C. 5735.05, 5735.25 and 5735.29. As originally enacted in 1981, R.C. 5735.145 granted a credit to dealers against such taxes with respect to fuel containing a blend of not more than ten percent by volume of ethanol, *without regard to where the ethanol was produced.* Effective January 1, 1985, however, the General Assembly amended R.C. 5735.145, adding subsection (B), which provides:

"The qualified fuel otherwise eligible for the qualified fuel credit *shall not contain ethanol produced outside Ohio unless the tax commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing ethanol produced in Ohio;* provided, however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio." (Emphasis added.)

Thus, R.C. 5735.145(B) facially discriminates against interstate commerce. As the majority appears to concede, it also attempts to force other states to enact reciprocal legislation. Accordingly, as the majority recognizes, the statute is subject to the "strictest scrutiny." See *Sporhase* v. *Nebraska, ex rel. Douglas* (1982), 458 U.S. 941, 958; *Hughes* v. *Oklahoma, supra*, at 337. Nevertheless, the majority fails to strictly scrutinize R.C. 5735.145(B).

The majority's analysis is flawed in four separate respects.

A

First, the majority errs in insisting that R.C. 5735.145(B) regulates "evenhandedly," and in attempting to analogize the cause *sub judice* to *CTS Corp.* v. *Dynamics Corp. of America* (1987), 481 U.S. ——, 95 L.Ed. 2d 67, *Minnesota* v. *Clover Leaf Creamery Co.* (1981), 449 U.S. 456, and *Exxon Corp.* v. *Governor of Maryland* (1978), 437 U.S. 117. The Ohio statute (R.C. 5735.145[B]) is decidedly distinguishable from the statutes at issue in those cases.

In *CTS*, the Indiana statute gave protection to Indiana corporations from *all* hostile tender offers; it made no distinction between tender offers coming from within the state and those coming from outside it. Likewise, in *Clover Leaf Creamery*, the statute at issue simply forbade the sale of milk in nonreturnable, nonrefillable plastic containers; nothing in the statute distinguished between containers made in Minnesota and containers made elsewhere. Finally, in *Exxon*, the Maryland statute prohibited *all* producers and refiners of petroleum products from also operating retail gas stations in Maryland; it drew no geographical lines separating those producers or refiners.

In stark contrast, R.C. 5735.145(B) contains an *explicit* distinction between ethanol produced in Ohio and ethanol produced in states not granting a reciprocal tax credit. R.C. 5735.145(B) is thus plainly discriminatory on its face. Repetitious assertion by the majority that R.C. 5735.145(B) regulates "evenhandedly" is no substitute for analysis of the law.

Certainly the majority cannot muster support for such assertions from *CTS*, *supra*. In that case, the United States Supreme Court explained, in a passage only partially quoted by the majority:

"The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. * * * The Indiana Act is not such a statute. *It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana.* * * *

"* * * *Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors*, we reject the contention that the Act discriminates against interstate commerce." (Emphasis added.) *Id.* at ——, 95 L. Ed. 2d at 84.

Nor can the majority rely upon *Clover Leaf Creamery*, *supra*, wherein the Supreme Court emphasized:

"Minnesota's statute does not effect 'simple protectionism,' but 'regulates evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, *without regard to whether the milk, the containers, or the sellers are from outside the State. This statute is therefore unlike statutes discriminating against interstate commerce, which we have consistently struck down.*" (Emphasis added.) *Id.* at 471-472.

With all deference to the majority, R.C. 5735.145(B) is not a statute that imposes a burden upon businesses which, *coincidentally*, happen to be located outside Ohio. R.C. 5735.145(B) is a gun, aimed at businesses located outside Ohio.

B

In its attempt to wish away the distinction between R.C. 57.35.145(B) and the statutes in *CTS*, *Clover Leaf Creamery* and *Exxon*, the majority seizes on the credit given to ethanol producers in states that do grant reciprocal tax credits. Referring to those producers, the majority boasts that R.C. 5735.145(B) "does not give an advantage *solely* to Ohio producers." (Emphasis added.)

The majority apparently believes that a statute which grants a commercial advantage to in-state businesses does not discriminate against interstate commerce unless the advantage is granted "*solely*" to the in-state businesses. Contrary to this belief, the constitutional infirmity of R.C. 5735.145(B) is *aggravated* by its forced reciprocity provision.

The majority's position is undermined by *Great A & P Tea Co.* v. *Cottrell* (1976), 424 U.S. 366. In *A & P*, the Mississippi regulation at issue permitted the importation of milk produced in another state *only if that state accepted milk produced in Mississippi on a reciprocal basis.* Thus, as with R.C. 5735.145(B), the regulation did not "solely" protect in-state businesses. Milk producers outside Mississippi were also protected if their state allowed the importation of milk from Mississippi. Nevertheless, the United States Supreme Court struck down the mandatory reciprocity provision because upholding it would " 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.' " *Id.* at 380 (quoting *Dean Milk Co.* v. *Madison* [1951], 340 U.S. 349, 356).[2]

The majority acknowledges that the forced reciprocity provision in R.C. 5735.145(B) is a "thorny problem," but rationalizes it away on the premise that a decision favorable to appellant would cause other states' reciprocal tax credit programs to "fall like a row of dominos." However, the United States Supreme Court has emphasized that the tax laws of other states are irrelevant to a determination of whether a particular state's statute violates the Commerce Clause. See *Tyler Pipe Industries,*

[2] See, also, *Best & Co., Inc.* v. *Maxwell, supra,* wherein the United States Supreme Court held unconstitutional a North Carolina privilege tax imposed upon businesses which displayed merchandise for sale in that state but which were not "regular retail merchants" therein. As with R.C. 5735.145(B), the invalid North Carolina tax favored all in-state sellers and *some* out-of-state sellers.

Inc. v. *Washington Dept. of Revenue* (1978), 483 U.S. ——, ——, 97 L. Ed. 2d 199, 210, wherein the court proclaimed, as to the tax therein at issue:

"The facial unconstitutionality of Washington's gross receipts tax cannot be alleviated by examining the effect of legislation enacted by its sister States."

The Supreme Court in *Tyler Pipe Industries* emphasized: " 'The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend on the shifting incidence of the varying tax laws of the various States at a particular moment.' " *Id.* at ——, 97 L. Ed. 2d at 210, fn. 11 (quoting *Freeman* v. *Hewit, supra,* at 256, and *Armco Inc.* v. *Hardesty* [1984], 467 U.S. 638, 645, at fn. 8).

Therefore, the majority's attempt to escape from the facial discrimination of R.C. 5735.145(B) lands it squarely within the briar patch of forced reciprocity.

C

In its claim that R.C. 5735.145(B) is constitutional because it does not effect a *complete ban* upon the importation of ethanol from non-reciprocating states, the majority errs again. Even if it is assumed that the practical effect of a competitive disadvantage of twenty-five cents per gallon of ethanol is not tantamount to a complete ban, the majority's claim nonetheless fails because it rests upon the false premise that a complete ban is necessary to constitute a Commerce Clause violation.

In numerous cases, the United States Supreme Court has invalidated discriminatory state taxes without requiring that they be so drastic as to erect an impenetrable barricade to commerce at the state border. See, *e.g., Tyler Pipe Industries, supra; Bacchus Imports, Ltd.* v. *Dias* (1984), 468 U.S. 263; *Armco, supra; Maryland* v.

Louisiana (1981), 451 U.S. 725; *Boston Stock Exchange, supra.*[3]

Indeed, the law on discriminatory state taxes has been established for at lease a century. In *Walling v. Michigan* (1886), 116 U.S. 446, 455, the court declared:

"A discriminatory tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."[4]

Thus, the alleged absence of a complete ban upon the importation of ethanol by R.C. 5735.145(B) does not save this statute.

III

The majority makes its fourth and final error when it suggests that this court, if it finds R.C. 5735.145(B) unconstitutional, must then invalidate *all* of R.C. 5735.-145. There is no merit in this suggestion. This court could, and should, hold that R.C. 5735.145(B) *alone* is invalid. The result of such holding would be that the tax credit of R.C. 5735.145 would be available to dealers with respect to *all* ethanol sold, used, or distributed in Ohio—not just for ethanol which originates in Ohio or

[3] State regulations, as opposed to taxes, also need not affect a total ban upon importation to impermissibly burden or discriminate against interstate commerce. See *Hunt* v. *Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, wherein the court invalidated a facially neutral North Carolina statute requiring closed containers of out-of-state apples to bear no quality grade markings showing other than the applicable federal grade. Such regulation plainly did not completely ban the importation of out-of-state applies, but it did put their growers at a competitive disadvantage.

[4] This passage was recently quoted with approval in *Bacchus Imports, supra,* at 271.

in a state which grants reciprocal tax credits to Ohio producers. That result, unlike the one reached by the majority, would accomplish the evenhanded treatment mandated by the Commerce Clause.

The United States Supreme Court recently emphasized in *Tyler Pipe Industries, supra:* " 'The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state,' " *Id.* at ——, 97 L. Ed. 2d at 213 (quoting *Halliburton Oil Well Cementing Co.* v. *Reily* [1963], 373 U.S. 64, 70). Because R.C. 5735.145(B) fails to satisfy that condition precedent, I must respectfully dissent.

SWEENEY, Acting C.J., and LOCHER, J., concur in the foregoing dissenting opinion.

No. 86-784

NEW ENERGY COMPANY OF INDIANA,
Appellant,

v.

LIMBACH, Tax Commr., *et al.*,
Appellees.

File No. 5129

BROWN, CLIFFORD, J.

[Cite as New Energy Co. v. Limbach (1986), Ohio St. 3d.]

R.C. 5735.145(B) discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution. (Clause 3, Section 8 of Article I).

(No. 86-784—Decided December 26, 1986.)

APPEAL from the Court of Appeals for Franklin County.

Plaintiff-appellant, New Energy Company of Indiana, manufactures ethanol and is engaged in commerce among the states. Ethanol is a 199 proof alcohol which is mixed with gasoline in a 10/90 ratio to form a blend called gasohol. Plaintiff's manufacturing facility is located in South Bend, Indiana. Ethanol produced by New Energy has been marketed in Ohio at a rate of approximately one million gallons per month.

Effective January 1, 1985 the Ohio General Assembly amended R.C. 5735.145(B) to provide that any fuel otherwise eligible for a tax credit shall not contain ethanol produced outside Ohio unless the state of origin provides a similar tax credit, exemption or refund for similar fuel containing ethanol produced in Ohio. Indiana does not provide any such credit, exemption or refund for Ohio-produced ethanol.

Plaintiff brought this action to challenge the constitutionality of R.C. 5735.145(B), seeking declaratory and injunctive relief. Plaintiff contended, *inter alia*, that the statute violates the Commerce Clause of the United States Constitution by placing an undue burden on interstate commerce. Plaintiff alleged that the statute effectively barred it from marketing its ethanol in Ohio, since the unavailability of a tax credit for plaintiff's ethanol renders the product economically undesirable to Ohio dealers.

The trial court held that R.C. 5735.149(B) is constitutional, finding no significant burden on interstate commerce.

The court of appeals affirmed. In holding that the statute does not violate the Commerce Clause, the court reasoned that it has neither a discriminatory purpose nor a discriminatory effect. It gives no benefit to Ohio ethanol producers that is not equally available to an out-of-state producer as long as that state provides incentives to all ethanol producers, including Ohio, on an equal basis. The court stressed that the statute effectuates the legitimate state purpose of encouraging the production of an environmentally benign fuel additive as a replacement for lead, a notorious pollutant.[1] The statute does not constitute an outright ban on plaintiff's ethanol in Ohio, nor does it preclude plaintiff from doing business in Ohio. It gives no direct competitive advantage to Ohio

producers. It does not tax the use or sale of ethanol differently depending on whether it was produced in or out of Ohio. In sum, the statute does not impermissibly impose an oppressive burden on the industry and business of other states in order to enhance the vitality of domestic commerce.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Murphy, Young, & Smith, David J. Young, Kevin R. McDermott and *Herman Schwartz*, for appellant.

Anthony J. Celebrezze Jr., attorney general, and *Richard C. Farrin*, for appellees Tax Commissioner and Treasurer of State.

Jones, Day, Reaves & Pogue and David C. Crago, for appellee South Point Ethanol.

CLIFFORD F. BROWN, J. The chief question posed by this appeal is whether R.C. 5735.145(B) places an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. For the following reasons, we hold that it does, and that the statute is therefore unconstitutional.

R.C. 5735.05, 5735.25 and 5735.29 require motor vehicle fuel dealers to pay taxes on all motor vehicle fuel sold, used, or distributed in Ohio, including gasoline containing ethanol. As originally enacted in 1981, R.C. 5735.145 granted dealers a credit against such tax with respect to the sale, use or distribution of gasoline containing not more than ten percent by volume of ethanol. Effective January 1, 1985, the legislature amended the statute, adding subdivision (B), which is the subject of this appeal. It provides as follows:

"The qualified fuel otherwise eligible for the qualified fuel credit shall not contain ethanol produced outside Ohio unless the tax commissioner determines that the

fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing ethanol produced in Ohio; provided, however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio."

Appellant argues that this provision violates the Commerce Clause of the United States Constitution. It contends that the statute places an impermissible burden on interstate commerce by discriminating against ethanol produced outside of Ohio. Appellant submits that the court of appeals overlooked the practical impact of the statute, which is to bar from the Ohio market any producer from a state which does not have a reciprocal tax scheme. It gives a direct commercial advantage to local production at the expense of out-of-state manufacturers. The fact that the statute is not an outright ban on appellant's ethanol is irrelevant where that is its practical effect, since the statute makes it economically unfeasible for Ohio dealers to buy appellant's product.

We find this reasoning to be compelling. For the reasons that follows, we agree that R.C. 5735.145(B) is unconstitutional as an undue burden on interstate commerce.

The Constitution of the United States provides that "[t]he Congress shall have power * * * [t]o regulate commerce with foreign nations and among the several States * * *." Clause 3, Section 8 of Article I. The United States Supreme Court has held that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. * * * [T]he Commerce Clause even without im-

plementing legislation by Congress is a limitation upon the power of the States." *Freeman* v. *Hewit* (1946), 329 U.S. 249, 252. The states still reserve the power to impose taxes as a source of state revenue, but in exercising this power, the states must respect the national interest in free and open interstate trade. *Boston Stock Exch.* v. *State Tax Comm.* (1977), 429 U.S. 318, 329. This balancing of the state's interest in its indispensable power of taxation and the national need for an unrestrained interstate market has necessitated a case-by-case approach in this area, such that the result "turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Id.* at 329. A fundamental principle is that no state may impose a tax which discriminates against interstate commerce by presenting local business with a direct commercial advantage. *Memphis Steam Laundry Cleaner, Inc.* v. *Stone* (1952), 342 U.S. 389. State legislation which has the practical effect of barring out-of-state business while leaving domestic business unaffected discriminates against interstate commerce by insulating in-state industry from the effects of out-of-state competition. *Hunt* v. *Wash. State Apple Adv. Comm.* (1977), 432 U.S. 333.

In formulating our analysis of whether R.C. 5735.145 (B) impermissibly burdens interstate commerce, we must remain mindful of the importance of Ohio's power of taxation and the legitimate purpose, if any, of the statute at issue. *Boston Stock Exch., supra.* We are aware of the benefits of ethanol as a cost-effective replacement for lead in gasoline. Lead is a proven atmospheric pollutant, while ethanol is considered an environmentally benign additive. We are fully cognizant that encouraging the use of ethanol as a substitute for lead in gasoline is a legitimate goal of state government as a means of promoting the health of its citizens. However, a finding that

the statute furthers matters of legitimate local concern does not end the inquiry. The local concern must be weighed against the competing national interest in unhindered interstate trade. *Hunt, supra,* at 350. Upon weighing the goal as effectuated by R.C. 5735.145(B) against the burden it imposes on interstate commerce, we find that the burden is excessively oppressive and therefore constitutionally unacceptable.

"The commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co.* v. *Maxwell* (1940), 311 U.S. 454, 455; *Dayton Power & Light Co.* v. *Lindley,* (1979), 58 Ohio St. 2d 465, 468. The United States Supreme Court has framed the general rule for determining the validity of state statutes affecting interstate commerce as follows: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.* (1970), 397 U.S. 137, 142.

Thus, the statute must regulate "even-handedly" in order to clear even the first hurdle of a Commerce Clause inquiry. This essential attribute of even-handed treatment is not present in R.C. 5735.145(B). The statute makes a distinction based on the origin of the ethanol, a distinction which favors all Ohio ethanol producers but only some out-of-state producers. This cannot be countenanced. It is unavailing that the statute unduly burdens only some, rather than all, out-of-state producers. The United States Supreme Court has stricken a North Carolina annual privilege tax levied against every person or corporation, not a regular retail merchant in the state, who displayed samples in any hotel room rentered or occupied temporarily for the purpose of securing retail orders. *Best & Co.,* supra. The statute was invalidated even though the court recognized that some out-of-state

businesses may be "regular retail merchants" (*ibid.* at 456) in North Carolina and thus would be unaffected. The court reasoned that the statute, in its practical operation, creates an atmosphere hostile to interstate commerce and discourages the participation of competitors in the intrastate market. *Id.* at 456-457. Thus, the fact that a statute burdens only some, rather than all, out-of-state competition will not save an otherwise invalid state law.

We believe that the instant cause is similar in several respects to *Hunt*, supra. In *Hunt*, the United States Supreme Court struck down a North Carolina statute which prevented containers of apples shipped into that state from reflecting state quality grades. The court found that the challenged statute had the practical effect of not only burdening interstate sales of apples from Washington state, which displayed the Washington state variety and grade label, but also discriminating against them. *Id.* at 350. The barring of grade levels had the result of increasing the cost of doing business in North Carolina for Washington apple growers and dealers while leaving their North Carolina counterparts unaffected. *Id.* at 351.

The same effect is apparent in the case *sub judice*. The statute herein makes it more difficult, if not impossible, for appellant to sell its product in Ohio, while Ohio producers remain as free to market their wares as they were prior to the statute's enactment. The overall effect is to shield Ohio producers from competition from Indiana or any other state that does not give Ohio ethanol a tax credit similar to Ohio's. This discrimination against sales of a product according to its point of origin and the resultant burden imposed on free and open trade is constitutionally unaccpetable. See, also, *Pike*, supra.

Where a discriminatory effect against interstate commerce is established, the state bears the burden of jus-

tifying it by showing both the local necessity for the statute and the unavailability of nondiscriminatory alternatives to further the same local interest. *Dean Milk Co.* v. *Madison* (1951), 340 U.S. 349, 354; *Hunt*, *supra*, at 353. In our view, appellees have not sustained this burden. The purported purpose of R.C. 5735.145(B) is to encourage the use of ethanol in Ohio gasoline through the allowance of a tax credit. But the ethanol produced in a state without a reciprocal tax scheme, which is not eligible for the credit, is no less desirable from a public health standpoint than ethanol produced in a reciprocating state. Nor have the appellee demonstrated the unavailability of a nondiscriminatory alternative to this scheme. The allowance of a tax credit for qualified fuel containing ethanol without regard for the ethanol's point of origin would have the same effect of encouraging the use of this additive without the discriminatory aspect of the present scheme. Appellees' argument that the reciprocity clause will prompt states surrounding Ohio to enact similar tax credit schemes to encourage ethanol use, thereby decreasing the polluting effect of neighboring atmospheres on Ohio's, is unpersuasive. The connection between the statute and this purported effect is too tenuous to justify the extreme burden on the free flow of interstate commerce.

The constitutional infirmity of R.C. 5735.145(B) is actually aggravated by this additional feature of forced reciprocity. The statute precludes any claim for a tax credit for fuel containing ethanol produced outside Ohio *unless* the ethanol was "produced in a state that also grants an exemption, credit or refund * * * for similar fuel containing ethanol produced in Ohio." Thus, in order for ethanol produced out of state to qualify for the Ohio credit, the foreign state must provide Ohio ethanol with a similar credit. This "forced reciprocity" is violative of the Commerce Clause. In *Great A & P Tea Co., Inc.* v. *Cottrell* (1976), 424 U.S. 366, the United States

Supreme Court invalidated a Mississippi regulation which provided that milk and milk products from another state may be sold in Mississippi only if the other state accepts milk or milk products produced and processed in Mississippi on a reciprocal basis. The court held that a state may not, consistent with the Commerce Clause, "use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement." *Id.* at 379. The practical effect of such forced reciprocity provisions is to ban from the intrastate market any competitor from a state which does not obey the command to reciprocate. This effect of suppressing competition is constitutionally intolerable. See, also, *Baldwin* v. *G.A.F. Seelig, Inc.* (1935), 294 U.S. 511; *Sporhase* v. *Nebraska* (1982), 458 U.S. 941.

Accordingly, we hold that R.C. 5735.145(B) discriminates against interstate commerce in violation of the Commerce Clause of the United States Constitution (Clause 3, Section 8 of Article I). The judgment of the court of appeals is therefore reversed.

Judgment reversed.

CELEBREZZE, C.J., SWEENEY and LOCHER, JJ., concur.

HOLMES, DOUGLAS and WRIGHT, JJ., dissent.

No. 86-784

NEW ENERGY CO.

v.

LIMBACH

File No. 5129

HOLMES, J., dissenting. Because I do not feel that R.C. 5735.145(B) imposes an unreasonable restraint or undue burden on interstate commerce, I must dissent from the majority's analysis and conclusion.

Ethanol producers in states which do not offer the reciprocal tax abatement to Ohio producers are quite able, even after the amendment of the Motor Vehicle Fuel Tax Act, to offer their product in Ohio ethanol markets—they simply are at a disadvantage price-wise vis-a-vis producers which offer ethanol that will procure a tax advantage for their Ohio consumers. Simply because New Energy Company of Indiana's proportion of the Ohio ethanol sales market may decrease because its profits will be substantially reduced does not necessarily establish a claim of unconstitutional discrimination against interstate commerce. See *Exxon Corp.* v. *Governor of Maryland* (1978), 437 U.S. 117, 126. The Commerce Clause has been held to protect "'* * * the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" *Minnesota* v. *Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 474, rehearing denied (1981) 450 U.S. 1027.

According to appellees Tax Commissioner *et al.*, at least thirty states, in addition to Ohio, have reciprocal

ethanol tax incentive statutes like the one in question here. It is undisputed that R.C. 5735.145(B) will not affect these other states' sales of ethanol in Ohio and their participation in interstate commerce. A statute does not impose an unconstitutional burden on interstate commerce simply because it, like the one in issue, merely "* * * causes some business to shift from one interstate supplier to another." *Exxon Corp., supra,* at 127.

When state regulations contain a direct and unequal prohibition against out-of-state distribution, such may be a discriminatory burden on interstate commerce, *Hunt* v. *Washington State Apple Advertising Co.* (1977), 432 U.S. 333; *Memphis Steam Laundry Cleaner, Inc.* v. *Stone* (1952), 342 U.S. 389, and in those instances "only state interests of substantial importance" will save a statute, *Great A & P Tea Co., Inc.* v. *Cottrell* (1976), 424 U.S. 366, 375. However, in more complex situations such as the case *sub judice* in which there is no ban on interstate commerce, and where the statute regulates " 'a legitimate local public interest, and its effects on interstate commerce are only incidental, * * * [the regulation] will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation omitted.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.' " *Great A & P Tea Co., supra,* at 371-372. See, also, *Pike* v. *Bruce Church, Inc.* (1970), 397 U.S. 137, 142. Thus, the result in each Commerce Clause challenge involving state taxing powers "* * * turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exch.* v. *State Tax Comm.* (1977), 429 U.S. 318, 329.

As the majority concedes, encouraging the use of ethanol as a substitute for lead in gasoline is a legitimate, if not compelling, goal of the state as a means of promoting the health of its citizens. It must also be understood that the practical effect of R.C. 5735.145(B) is not to bar the sale of appellant's corn product, but is to make the cost of appellant's ethanol more expensive to Ohio consumers vis-a-vis ethanol from some thirty-one other states. Since appellant failed to put forth any evidence that this would cause any major shifts in the interstate versus intrastate producers' proportions of the Ohio ethanol market, these effects are purely incidental to the state's attempt to reduce the amount of lead being emitted into the atmosphere. Additionally, this statute cannot be said to be excessively broad in relation to this state interest. The record establishes that, because of the high cost of producing ethanol, the market in which appellant competes would not even exist without federal and state tax incentives to gasoline dealers. Thus, the best, or perhaps only, way to achieve the state's goal of ethanol use is through its tax incentive program.

Having satisfied the basic requirements of the *Great A & P Tea Co., supra,* test, the question then becomes whether the state's interest in reducing lead pollutants outweighs the burden the state law could impose on interstate commerce. See, also, *Metropolitan Life Ins. Co.* v. *Ward* (1985), —— U.S. ——, 84 L.Ed. 2d 751, 760. Under our constitutional system, "* * * the States retain 'broad power' to legislate protection for their citizens in matters of local concern such as public health, * * * [citation omitted] and * * * not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Great A & P Tea Co., supra,* at 371; see, also, *Pike, supra,* at 143, where the court stated that the propriety of local legislation in the field of health and safety has long been recognized. Given these broad standards for reviewing

Commerce Clause challenges, I would find that the incidental burden on interstate commerce which may be caused by R.C. 5735.145(B) is outweighed by the state's interest in alleviating air pollution in this state, and in encouraging voluntary reciprocal provisions in other states does affect Ohio citizens).

This court has held "that in the absence of a showing that a statute is unconstitutional beyond a reasonable doubt, it will be upheld." *State, ex rel. Swetland,* v. *Kinney* (1980), 62 Ohio St. 2d 23, 30. Appellant bears a heavy burden to overcome the presumption of constitutionality of the statute, *i.e.*, "'* * * to negative every conceivable basis which might support it.'" *Dayton* v. *Cloud* (1972), 30 Ohio St. 2d 295, 300, quoting *Madden* v. *Kentucky* (1940), 309 U.S. 83, 88. There is no evidence that the instant statute was passed solely for the purpose or effect of protecting or giving commercial advantage to the one local manufacturer of ethanol at the expense of interstate commerce. In fact, the evidence shows that Ohio's one manufacturer is not equipped to fill any void in the Ohio market which might be caused by R.C. 5735.145(B). The fact that the provision may cause a shift in the Ohio market among out-of-state producers does not cause a discrimination against interstate commerce. *Clover Leaf Creamery Co., supra,* at 473; *Exxon, supra,* at 127.

Even if this tax statute were for the purpose of encouraging local industry, or for protecting local manufacturers from other states' tax schemes which discriminate against ethanol produced in any other state, such are permissible purposes, so long as it does not "* * * impose a discriminating burden upon the business of other States *merely* to protect and promote local business." *Metropolitan Life Ins. Co., supra,* at 759, fn. 6. (Emphasis added.) Appellant clearly did not prove a discriminatory burden merely to protect and promote Ohio's ethanol business under the standard set forth in

Kinney, supra. Appellant not only failed to put forth any evidence that interstate commerce is or will be injured, but it also failed to show that local protection or promotion was the tax statute's sole purpose. See *Baldwin* v. *G.A.F. Seelig* (1935), 294 U.S. 511, 524, where the court struck down a statute which it recognized as having the sole purpose of economic protectionism.

Appellant cannot satisfy these tests beyond a reasonable doubt because R.C. 5735.145(B) allows tax credits on ethanol produced and imported from outside Ohio, and because the statute has the obvious purposes (1) of affording incentives for the use of ethanol in gasoline and (2) of encouraging other states to afford similar incentives. Not only is there no ban and no protectionism involved here, but the Ohio tax law actually encourages the purchase of ethanol produced in other states having similar incentive programs. Thus, this case is different from the decision in *Great A & P Tea Co., supra,* in which totally banned the importation of Louisiana milk into Mississippi because such law had a "devastating effect upon the free flow of interstate milk," *id.* at 375, and also is different from *Sporhase* v. *Nebraska* (1982), 458 U.S. 941, 957, in which the court struck down a reciprocal statute because it "operates as an explicit barrier to commerce."

Because R.C. 5735.145(B) does not protect Ohio's ethanol producer from competition from out-of-state ethanol producers, it is different from those statutes in all the relied-upon cases which have been struck down for interfering with interstate commerce. *Bacchus Imports, Ltd.* v. *Dias* (1984), 468 U.S. 263; *Armco, Inc.* v. *Hardesty* (1984), 467 U.S. 638; *National Meat Assn.* v. *Deukmejian* (C.A. 9, 1984), 743 F.2d 656, affirmed without opinion (Jan. 7, 1985), —— U.S. ——, 83 L.Ed.2d 766; *Boston Stock Exch., supra, Dayton Power & Light Co.* v. *Lindley* (1979), 58 Ohio St. 2d 465; *American Modulars* v. *Lindley* (1978), 54 Ohio St. 2d 273; *Phila-*

delphia v. *New Jersey* (1978), 437 U.S. 617; and *Great A & P Tea Co., supra.*

The case *sub judice* is more like *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577, than it is like the above cases. The *Henneford* court upheld a state statute which exempted out-of-state sales from the state use tax if a use or other state tax of similar amount had already been paid in the state of purchase. Since that tax scheme, which merely looked to the out-of-state tax treatment before in-state taxes were determined, was held to be non-discriminatory, so too should Ohio's abatement system which merely looks to the ethanol tax abatement treatment in the state of production.

Accordingly, I would affirm the judgment of the court of appeals.

Douglas and Wright, JJ., concur in the foregoing dissenting opinion.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 85AP-340

(REGULAR CALENDAR)

NEW ENERGY COMPANY OF INDIANA,
Plaintiff-Appellant,

v.

JOANNE LIMBACH *et al.,*
Defendants-Appellees.

OPINION

Rendered on May 8, 1986

MESSRS. MURPHEY, YOUNG & SMITH, MR. DAVID J. YOUNG, MR. KEVIN R. McDERMOTT and R. JOHN K. LINES; MR. HERMAN SCHWARZ, for appellant.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, and MR. RICHARD C. FARRIN, for appellees Joanne Limbach, Tax Commissioner, and Mary Ellen Withrow, Treasurer, State of Ohio.

MESSRS. JONES, DAY, REAVIS & POGUE, MR. DAVID C. CRAGO, MR. JAMES R. KING and MS. GAIL E. GRIFFITH, for appellee South Point Ethanol.

APPEAL from the Franklin County Court of Common Pleas.

WHITESIDE, J.

Plaintiff, New Energy Company of Indiana, appeals from a judgment of the Court of Common Pleas of Franklin County and has asserted the following as assignments of error:

> "1. State tax laws which discriminate on the basis of out-of-state origin place an impermissible burden on interstate commerce and violate the Commerce Clause of the U.S. Constitution.
>
> "2. A legislative purpose of 'affecting the policies of other states' by an insistence on reciprocity is not a legitimate purpose under the Commerce Clause and does not legitimate tax laws which discriminate against out-of-state manufacturers or producers.
>
> "3. Commerce Clause violations do not require an absolute *ban* on doing business in the state which affects all interstate competitors.
>
> "4. Once the United States Supreme Court has declared specific categories of legislation to be invalid under the Commerce Clause, a state statute within that category cannot be saved by a state presumption in favor of constitutional validity."

Defendant, South Point Ethanol, although it filed no notice of appeal, has raised the following cross-assignment of error:

> "The trial court erred in finding that the appellant has standing to challenge the constitutionality of Ohio Rev. Code § 5735.145(B)."

Plaintiff brought this action challenging the constitutionality of the 1984 amendment to R.C. 5735.145(B), seeking declaratory and injunctive relief and naming defendants State Tax Commissioner and State Treasurer as defendants. Subsequently, defendant, South Point Ethanol, an Ohio producer of ethanol, was granted leave to intervene as a party-defendant.

R.C. 5735.05, 5735.25 and 5735.29 impose upon motor vehicle fuel dealers taxes with respect to all motor vehicle fuel, including gasoline containing ethanol sold, used, or distributed in Ohio. R.C. 5735.145, originally effective in 1981, grants motor vehicle fuel dealers a credit against such tax with respect to the sale, use or distribution of gasoline containing not more than ten percent by volume of ethanol. In 1984, R.C. 5735.145 was amended extensively, effective January 1, 1985, including the addition of R.C. 5735.145(B), which is the subject of this action and reads as follows:

> "(B) The qualified fuel otherwise eligible for the qualified fuel credit shall not contain ethanol produced outside Ohio unless the tax commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing ethanol produced in Ohio; provided however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio."

Prior to the amendment, the credit was thirty-five cents per gallon, but a statutory formula for calculation of the credit was adopted by the amendment, one of the purposes of which was to reduce the credit coincidental with an increase in the federal gasohol tax exemption.

The common pleas court correctly held that R.C. 5735.145(B) is constitutionally enforceable since plaintiff has demonstrated no violation of the Privileges and Immunities, the Equal Protection or Commerce Clauses of the United States Constitution, as contended.

At the outset, it must be noted that plaintiff has failed to set forth assignments of error in the manner required by the Appellate Rules. Not only are the assignments of error not separately stated *after* the table of contents

[App. R. 16(A)(2)], but what are labelled assignments of error are mere abstract statements of legal principles urged by plaintiff without any relationship to any error of law or fact the trial court is claimed to have committed. Nevertheless, we shall attempt to consider each as if it did raise an issue of some error on the part of the trial court. However, all of plaintiff's statements of contended law refer to the Commerce Clause, so that no issue is raised herein with respect to the Privileges and Immunities or Equal Protection Clauses. Thus, even assuming that plaintiff has a valid argument that the statute denies it equal protection of the law, that issue is not before us. Rather, the sole issue is whether the statute places an undue burden upon interstate commerce.

The parties filed a nonexclusive agreed statement of facts in the trial court, which includes the following:

> "1. The plaintiff, New Energy Company of Indiana ('New Energy'), is an Indiana limited partnership engaged in Commerce among the states in the business of manufacturing ethanol. The plaintiff's manufacturing facility is located in South Bend, Indiana (Tr. 5). The plaintiff is the only ethanol manufacturer with production facilities in Indiana. Ethanol produced by New Energy is presently sold to blenders in several states including Ohio, Indiana and Illinois. (Plaintiff's Exs. 1 and 2)
>
> "* * *
>
> "5. South Point Ethanol ('South Point') intervened in this action as a defendant on March 27, 1985. South Point is a joint venture between Ashland Oil Company, the Ohio Farm Bureau, UGI and Publicker Industries which produces ethanol in Lawrence County, Ohio.
>
> "6. South Point was formed in 1981 to retrofit a closed chemical plant. Its facility is located in South Point, Ohio. The joint venturers have invested ap-

> proximately $120,000,000 in South Point. Additionally, South Point provides approximately 185 jobs and expends $100,000,000 annually in the production of ethanol from corn.
>
> "* * *
>
> "9. Ethanol is a 199 proof alcohol. It is derived from corn which is treated with enzymes that convert the starch to sugar and ultimately into alcohol. Ethanol is mixed with gasoline in a 10/90% ratio to form a blend commonly referred to as gasohol (Tr. 14).
>
> "10. Ethanol is beneficial as a fuel additive to increase the octane rating of gasoline without contributing any additional lead into the environment. Ethanol is, in fact, the cost effective replacement for lead in gasoline and is the most environmentally benign replacement for lead. The production of ethanol also provides an outlet for the sale of corn surpluses (Tr. 9).
>
> "11. Various governmental bodies have initiated programs to encourage the production of ethanol. The United States Department of Energy provides grants for feasibility studies and guarantees 90% of certain qualifying loans (Tr. 9). To encourage the use of ethanol, the Department of Treasury exempts ethanol/gasoline blends from 6¢ of the 9¢ federal excise tax on gasoline (Tr. 9). In addition, at least thirty-two states allow credits from their respective motor fuel taxes for ethanol/gasoline blends (Tr. 10). The provision of tax credits has been the best method adopted by the federal and state government to encourage the use of ethanol.
>
> "* * *
>
> "19. The amount of state tax credit available to dealers of ethanol on a gallon of ethanol directly affects the per gallon price that dealers pay to

ethanol producers in that the lower the available credit, the lower the price paid to ethanol producers for a gallon of ethanol (Tr. 28-29).

"20. The continued enforcement of R.C. § 5735.145 (B) will cause financial hardship to plaintiff."

In finding no Commerce Clause violation, the trial court stated in part:

"This Court has previously held that the purpose of the legislation in enacting *Rev. Code* 5735.145(B) was legitimate. The Court has further held that the plaintiff will receive a economic hardship as a result of the legislation; however, this Court has not found that the legislation will impose a significant burden on interstate commerce. There is no absolute ban on the purchase and/or sale of plaintiff's ethanol as a result of the legislation. Plaintiff is not precluded from doing business in Ohio; nor is any other producer. Plainitff [*sic*] is presently the only ethanol producer which is indirectly affected by the legislation.

"Plaintiff cites the *Miller, supra, Bacchus, Imports, supra, Great A & P, supra,* and *Deukmejian* v. *Nat'l Meat Assoc.*, 53 U.S.L.W. (January 7, 1985, No. 84-720) cases for the proposition that a state cannot favor in-state businesses to the detriment of out-of-state businesses. This is not totally accurate. A state may have a discriminatory tax if such tax does not significantly burden interstate commerce.

"The tax legislation does not ban the sale of products in Ohio manufactured in other states not having a reciprocal provision as in *Great A & P, supra.* The tax does not grant a credit solely for Ohio produced ethanol as in *Bacchus, Imports, supra.* The tax does not tax the use of ethanol differently depending on whether the ethanol was produced in Ohio or out of

Ohio as in *Deukmejian, supra,* and it does not apply a direct commercial advantage to all Ohio producers over all out-of-state producers as in *Miller, supra, Boston Stock Exchange, supra.*

"The Supreme Court has consistently held:

" '. . . under our constitutional scheme the states retain "broad power" to legislate protection for their citizens in matters of local concern. Such as public health . . ., and that not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the state. [*Great A &P, supra,* at p. 371].

" " * *

" 'A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the state's legitimate purposes does such a regulation violate the Commerce Clause. [*Minnesota* v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 459 at p. 474].'

"The two state court cases in which courts have struck down ethanol tax legislation on Commerce Clause grounds are *Archer Daniels Midland Co.* v. *State*, 315 N.W. 2d 597 (Minn, 1982) and *Miller, supra.* In both cases no tax credit was given for any out-of-state (out of country, in *Miller*) produced ethanol. Even though the plaintiffs in those cases could sell their products in the respective states, the burden on interstate commerce was severe because there was no set of facts which could make them eligible for the exemption. In the case at bar, plaintiff is the only producer affected and it would not have been affected if its state legislature had not abolished its tax credit. It could be said that the

Indiana legislature created the hardship to the plaintiff as much as the Ohio legislature did."

As the trial court correctly noted, this is not a case of economic protectionism, that is, a device to provide a commerce advantage to in-state business over its out-of-state competitors. Although economic protectionism may be found because of either a discriminatory purpose or a discriminatory effect, neither is present here as the trial court correctly found factually and legally. On the other hand, *Bacchus Imports* v. *Dias* (1984), 104 S. Ct. 3049, was strictly an economic protectionism case since the Supreme Court found that the Hawaii statute involved "had both the purpose and effect of discrimination in favor of local products" (at 3057), since it provides for exemption from taxation only certain products produced in Hawaii, the court noting (at 3057): "It has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.'"

The Ohio statute, however, gives no benefit to Ohio producers of ethanol that are not equally available to an out-of-state producer so long as the home state provides incentives to all producers of ethanol, including Ohio producers, on an equal basis. Thus, the Ohio statute serves three basic purposes: (1) it affords an incentive for use of ethanol in gasoline; (2) it encourages other states to afford similar incentives; and (3) it protects Ohio producers against discriminatory ethanol incentive programs which provide incentives only for ethanol produced in that state such as the Indiana incentive program, the benefit of which plaintiff enjoys whether it sells ethanol in Indiana or Ohio. All of these are legitimate state purposes.

Although an equal protection case, the Supreme Court in *Metropolitan Life Ins. Co.* v. *Ward* (1985), 105 S. Ct. 1676, stated at 1683:

"* * * Under Commerce Clause analysis, the State's interests, if legitimate, is weighed against the burden the state law could impose on interstate commerce. * * *"

In a case involving a regulation rather than a tax, a similar test was applied in *Pike* v. *Bruce Church, Inc.* (1970), 397 U.S. 139, 90 S.Ct. 844, wherein it is stated at 847:

"Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. * * * And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues * * *."

Pike found a state statute invalid because of its effect "to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within * * * [the state's] borders."

In *Boston Stock Exchange* v. *State Tax Comm.* (1977), 429 U.S. 318, 97 S.Ct. 599, it is stated at 606:

"On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in excerising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. * * *"

The court continued with the fundamental principle that: "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" The court found the New York transfer tax to be invalid "[b]ecause it imposes a greater tax liability on out-of-state sales than on in-state sales," the obvious effect of which "is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchange." There is no such effect of the Ohio statute in question, nor does it tax in-state and out-of-state sales at different rates. The *Boston Stock Exchange* court distinguished *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577, 57 S.Ct. 524, which held valid a statute which exempted out-of-state sales from the use tax if a use or sales tax of similar amount had been paid in the state of purchase, finding such a tax structure to be nondiscriminatory. The Ohio tax structure involved is similar, although a partial rebate of taxes rather than an additional tax is involved. The granting of the rebate depends upon the rebate treatment of the state of production. If that state grants a similar rebate with respect to ethanol produced in other states, including Ohio, the Ohio rebate is available, just as the use tax in *Henneford* was not applied if the state of sale imposed and collected a similar tax.

Although the Supreme Court in *Great A & P Tea Co.* v. *Cottrell* (1976), 424 U.S. 366, 96 S.Ct. 923, held a Mississippi reciprocity requirement invalid, the statute in question prohibited sale in Mississippi of milk processed in another state unless that state's regulatory agency accepted milk processed in Mississippi on a reciprocal basis. Not only does the Ohio statute in question permit, rather than prohibit, sale in Ohio of ethanol produced in other states, but the sale of all gasoline containing ethanol is taxed at the same rate. An after-the-fact (sale) incentive credit is given regardless of the state of production if similar credits are afforded by that state.

The Ohio statute permits, without restriction, the sale in Ohio of gasoline containing ethanol produced in any state. The Ohio statute confers no competitive advantage to an Ohio producer of ethanol over out-of-state producers with respect to sale of ethanol produced in Ohio. The tax imposed on the sale of gasoline including that containing ethanol to Ohio consumers is the same regardless of the state of production. The Ohio statute does provide an incentive credit to Ohio retail dealers in motor vehicle fuel for the sale of gasoline containing ethanol provided the ethanol is produced in a state giving a similar credit with respect to gasoline containing ethanol sold in that state, whether produced in that state or another state, including Ohio.

The Ohio statute does not tax directly or indirectly ethanol produced in another state or in Ohio, nor give an incentive rebate or credit to the producers of ethanol to place them at a competitive advantage. The dealer is free to purchase ethanol from any source and is not required to pass any credit received on either to the producer or the consumer.

Although the evidence indicates that thirty-two states provide tax credits similar to that of Ohio to dealers selling gasoline containing ethanol, including Ohio, Kentucky, Tennessee, Michigan, Illinois, Minnesota and Indiana, only producers of ethanol in Indiana, Illinois, Tennessee, and Ohio are currently furnishing the ethanol which is blended with gasoline for sale in Ohio. Dealers are entitled to the credit or rebate for all ethanol currently being sold in Ohio, including that produced by plaintiff in Indiana, except that the amount of credit received by dealers selling ethanol produced by plaintiff may be less than that received from selling ethanol produced in other states (including Illinois and Tennessee) because Indiana is phasing out its tax-credit incentive program and replacing it with a subsidy-incentive program available only to plaintiff, the subsidy being paid only to Indiana

producers. Unlike the Ohio tax-credit program, the Indiana subsidy program is paid directly to the Indiana producer of ethanol (plaintiff), presumably giving it a competitive advantage over ethanol producers in other states.[1]

Not only does the Ohio statute facially give no competitive advantage to Ohio producers of ethanol, but the evidence indicates that, if the result of the Indiana subsidy program would be to reduce sales by plaintiff of ethanol to Ohio dealers, the primary beneficiaries would be Illinois and Tennessee producers of ethanol, whose sales of ethanol to Ohio dealers would probably increase. Thus, the Ohio statute does not give a direct commercial advantage to Ohio producers of ethanol.

Turning to the abstract statements of law posed as assignments of error, it is difficult to approach them directly because each states a correct principle of law, but those principles do not apply under the Ohio statute and the facts and circumstances involved.

As to the first assignment of error, the Ohio statute does not discriminate upon the basis of state of origin, nor does it place an impermissible burden on interstate commerce for the reasons stated above. The first assignment of error is not well-taken.

The same is true with respect to the second assignment of error. The Ohio statute does not "insist upon reciprocity" but, instead, permits sale of gasoline containing ethanol regardless of the state in which the ethanol was produced. Nor is reciprocity the primary purpose of the

[1] There is no suggestion that the Indiana subsidy law violates the Commerce Clause. Subsidies to attract and promote business are widely used to attract new business to locate in a state and is a legitimate state purpose. Such subsidies, however, necessarily have some effect of giving the beneficiary of the subsidy a competitive advantage over interstate competitors not receiving such subsidy.

dealer credit or rebate program as stated above. Nor does the Ohio law discriminate against out-of-state manufacturers or producers as demonstrated above. The second assignment of error is not well-taken.

While it is true that there may be a Commerce Clause violation even though there is no ban affecting all interstate competitors, the Ohio statute does not *ban* any out-of-state produced ethanol from being sold in Ohio. Furthermore, while an only partial ban does not, *ipso facto*, preclude a Commerce Clause violation, it also does not *ipso facto* establish one. Here, not only is there no ban, but the Ohio statute encourages rather than discourages the sale in Ohio of ethanol produced in other states and gives no commercial competitive advantage to Ohio producers of ethanol over out-of-state producers generally, even assuming that Ohio producers are given the same competitive advantage as Illinois and Tennessee producers (and conceivably those of twenty-eight other states having similar tax-incentive programs). The third assignment of error is not well-taken.

Although a state presumption of constitutional validity cannot overcome a Commerce Clause violation specifically found by the United States Supreme Court, the trial court did not utilize such a presumption as the predicate for its decision. Instead, the trial court specifically and correctly found there to be no Commerce Clause violation under the standards pronounced by the United States Supreme Court. Accordingly, the fourth assignment of error is not well-taken.

On the other hand, the cross-assignment of error of intervening defendant South Point Ethanol, might be well-taken if it were properly before us.

In *Board of Edn.* v. *Guy* (1901), 64 Ohio St. 434, the Supreme Court adopted the syllabus rule that: "An action to enjoin the levy or collection of a tax can be maintained only by one who is a taxpayer." Accord.

State, ex rel. Bowers, v. Maumee Watershed Cons. Dist. (1954), 98 Ohio App. 111. The motor vehicle fuel tax is imposed on and collected from the dealer in motor vehicle fuel, including gasoline. The credit, which is the subject of this action, is paid or credited to such retail motor vehicle fuel dealer. No part of the credit is required by law to be passed on, directly or indirectly, to the producer of ethanol in or out of this state, although the practical effect may be that a dealer will purchase ethanol for which he will receive a tax credit in preference to ethanol for which he will not receive the tax credit, unless the latter is sufficiently lower in price to offset the tax credit.

However, defendant South Point has not filed a notice of appeal and, instead, relies upon R.C. 2505.22 and *Duracote Corp.* v. *Goodyear Tire & Rubber Co.* (1983), 2 Ohio St. 3d 160. Cross-assignments of error may be raised by an appellee who has not filed a timely notice of appeal only defensively to prevent reversal of a judgment but may not be utilized to obtain affirmative relief. If plaintiff's assignments of error were well-taken, South Point's cross-assignment of error would seek affirmative relief upon an issue determined adversely to it by the trial court, namely, the standing of plaintiff to bring this action but would not affect the basic constitutional issue. Although the question of whether the issue can be raised by a cross-assignment of error of a nonappealing appellee may be a close one, under the unique circumstances of this case, we conclude the cross-assignment of error to be inappropriate. Since we affirm, the issue raised would not be appropriate for determination for that additional reason.

For the foregoing reasons, all four of plaintiff's assignments of error and defendant South Point's cross-assignment of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

McCORMAC, J., concurs.

STERN, J., dissents.

STERN, J., retired Justice of the Ohio Supreme Court, assigned to active duty pursuant to Section 6(C), Article IV, Ohio Constitution.

STERN, J., dissenting.

The preliminary issue of standing must be addressed first. A two-prong test was promulgated by the United States Supreme Court in *Data Processing Service* v. *Camp* (1970), 397 U.S. 150. First, the court must examine whether the plaintiff has alleged "injury in fact, economic or otherwise." *Id.* at 152. The plaintiff has clearly established such injury. The Ohio tax amendment in effect precludes appellant from doing business in Ohio. Even though appellant itself does not pay the tax or receive the credit, its customers (the retailers) are denied more than half of the available tax credit when they buy from appellant. Consequently, appellant will lose its Ohio customers, who can readily purchase ethanol elsewhere and still receive the full credit. Second, the court must examine "whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153.

Appellant's interest in conducting interstate business free of discriminatory taxes and regulation is clearly within the zone of interests protected by the Commerce Clause. As the United States Supreme Court had noted, "* * * the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states * * *." *Boston Stock Exchange* v. *State Tax Commission* (1977), 429 U.S. 318, 328, citing

Freeman v. *Hewit* (1946), 329 U.S. 249, 252. Further, appellant's interest in conducting interstate business is regulated by the Ohio law in question.

Appellee South Point Ethanol asserts that appellant lacks standing because it is not a taxpayer. The lack of taxpayer status will not invalidate an action properly commenced by a plaintiff who has met the two-prong test of *Data Processing Service* v. *Camp, supra.* In *Boston Stock Exchange* v. *State Tax Comm., supra,* the plaintiffs, various stock exchanges located outside New York, challenged the constitutionality of New York's transfer taxes. The stock exchanges were deemed to have standing, even though they were not taxpayers of the state of New York. *Id.* at 320, n.3. Thus, appellee's assertion that taxpayer status is required is erroneous. The facts reveal that appellant is not a "taxpayer" in relation to the challenged statute. Appellant, however, is directly affected by the statute and will suffer economic injury. Thus, it has standing under the *Boston Stock Exchange* case.

In a case clearly parallel to the instant case, the Supreme Court of Florida held that brokers and importers of foreign ethyl alcohol (ethanol) had standing to challenge a Florida tax law. *Miller* v. *Publicker Industries, Inc.* (Fla. S.Ct. 1984), 457 So.2d 1374. In *Miller,* the state of Florida attempted to exempt only United States produced ethyl alcohol from the fuel tax. Thus, Florida retailers would not purchase the plaintiff's product or would require plaintiffs to substantially reduce the price of their product. The court held that the devastating effect this statute had on plaintiff's business was sufficient to confer standing. *Id.* at 1375. The court rejected the defendant's "restrictive view" that, simply because the plaintiff was not a taxpayer, it had no standing. *Id.* "The legislature may not protect a tax statute from constitutional review merely by ensuring that someone other than the party whose business is adversely affected must

pay the tax." *Id.* at 1375-1376. In the instant case, the Ohio legislature similarly may not prevent appellant from challenging the statute merely by ensuring that the ethanol retailers pay the tax. Clearly, it is appellant's business which will suffer the economic effect of this statute. Thus, I would hold that appellant has standing.

The free flow of goods between the states is protected by the Commerce Clause of the United States Constitution. "The Commerce Clause forbids discrimination, whether forthright or ingenious." *Best & Co.* v. *Maxwell* (1940), 311 U.S. 454, 455; *Dayton Power and Light Co.* v. *Lindley* (1979), 58 Ohio St. 2d 465, 468. This court has a duty to evaluate R.C. 5735.145(B) to determine whether, in practical operation, it will discriminate against interstate commerce. *Id.*

The Supreme Court outlined the general rule regarding the validity of state statutes affecting interstate commerce in *Pike* v. *Bruce Church, Inc.* (1970), 397 U.S. 137. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. The conclusion which must be drawn from applying this rule to the instant statute is that it violates the Commerce Clause.

The Ohio statute does not regulate even-handedly: it makes a distinction between the origin of the ethanol, giving an advantage to all in-state and some out-of-state producers. The appellees contend that the instant statute is distinguishable from those struck down in *Boston Stock Exchange* v. *State Tax Comm., supra,* and *Dayton Power & Light Co.* v. *Lindley, supra,* because in those cases the statutes favored by state producers at the expense of *all* out-of-state producers. Even if this may be true, the distinction is without a difference. As the

court noted in the *Boston Stock Exchange* case, the fact that a statute discriminates between two kinds of interstate transactions, rather than discriminating against interstate commerce in favor of intrastate commerce, is irrelevant—both types of statutes are unconstitutional. *Id.* at 333.

The same result was reached in *Best & Co., Inc.*, v. *Maxwell, supra.* In that case, a privilege tax was imposed on companies which sold merchandise in North Carolina, but were not regular retail merchants in the state. *Id.* at 455. The statutory scheme thus preferred all in-state companies and some out-of-state companies (those who were regular merchants) over other out-of-state companies (those who were not regular merchants). The Supreme Court held that the statute was unconstitutional because it interfered with the freedom of commerce. *Id.* at 457. If the key to the Commerce Clause is even-handed treatment, then, certainly, a statute which favors all in-state producers and some, but not all, out-of-state producers, is unconstitutional.

Even if this court were to hold that the Ohio statute regulates even-handedly, it nevertheless does not meet the other two prongs of the *Pike* test. First, appellees failed to adequately show that the statute effectuates a legitimate local public interest. The trial court noted that there were two interests advanced by appellee for the legislation: to keep the air clean around Ohio and to encourage other state legislatures to pass similar tax credit legislation. Further, the trial court held that the legislative purpose of promoting domestic industry and affecting other state's policies is legitimate. I cannot agree.

The clean air argument, upon which appellees heavily rely, is suspect at best. As noted above, even the trial court did not rely on the clean air argument to find a legitimate state purpose. Appellees argue at length about how the environment in and around Ohio can be improved by the use of ethanol. Such "sanitary security" arguments have been routinely rejected by the courts. *Baldwin* v. *G.A.F. Seelig, Inc.* (1935), 294 U.S. 511; *Great A & P Tea Co.* v. *Cottrell* (1976), 424 U.S. 366; *Philadelphia* v. *New Jersey* (1978), 437 U.S. 617.

Although clothed in terms of public health, the legislative purpose of R.C. 5735.145(B) is clear—forced reciprocity. The section states, in part:

> "The qualified fuel otherwise eligible for the qualified fuel credit shall *not* contain ethanol produced *outside Ohio unless* * * * the fuel claimed to be eligible * * * contains ethanol produced in a state that also grants an exemption, credit or refund * * * for similar fuel containing ethanol *produced in Ohio.* * * *" R.C. 5735.145(B) (Emphasis added.)

Thus, for a foreign state's ethanol to qualify for the credit in Ohio, the foreign state must give *Ohio producers* a similar credit in that state.

The United States Supreme Court has struck down forced reciprocal statutes as violative of the Commerce Clause. In *Baldwin* v. *G.A.F. Seelig, supra,* New York attempted to control the price of milk by providing that out-of-state milk could not be sold in state if the foreign state did not pay at least the New York minimum price for milk. The court held the statute unconstitutional, noting that distinctions between direct and indirect burdens are irrelevant when the purpose of the obstruction of commerce, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. *Id.* at 522. Clearly, the necessary tendency of the Ohio statute is to suppress or mitigate competition. Producers from states which do not grant Ohio producers a tax credit are, for practical purposes, precluded from competing in Ohio.

This conclusion was reaffirmed in *Great A & P Tea Co.* v. *Cottrell, supra*. In that case, Mississippi's forced reciprocity statute for milk sales was struck down as violative of the Commerce Clause. While voluntary reciprocity may be used by a state to promote its economy, forced reciprocity is forbidden. *Id.* at 378-379. In the instant case, Ohio is attempting to force its sister states to grant Ohio producers a tax credit. This forced reciprocity cannot be sustained.

The final prong of the *Pike* test requires an examination of the effects the Ohio statute will have on interstate commerce. As previously noted, the effects on interstate commerce will be devastating. Countless producers of ethanol will be unable to sell their product in Ohio if they are unlucky enough to be located in a state which does not grant at least two and one-half cents per gallon tax credit for Ohio-produced ethanol. This scheme places barriers to the free flow of commerce which cannot be viewed as "incidental."

When balancing the burden imposed on interstate commerce in relation to the putative local benefits of the Ohio statute, it is clear that the statute must be deemed unconstitutional. See *Pike* v. *Bruce Church, Inc., supra*, citing *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443.

I, therefore, respectfully dissent from the majority opinion.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 85AP-340

(REGULAR CALENDAR)

NEW ENERGY COMPANY OF INDIANA,
Plaintiff-Appellant,

v.

JOANNE LIMBACH *et al.*,
Defendants-Appellees.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on May 8, 1986, the assignments of error are overruled, and defendant South Point's cross-assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE and McCORMAC, JJ.

By Judge Alba L. Whiteside
Alba L. Whiteside

cc: David J. Young,
Kevin R. McDermott and
John K. Lines
Herman Schwartz
Richard C. Farrin
David C. Crago,
James R. King and
Gail E. Griffith

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Case No. 85CV-02-712

NEW ENERGY COMPANY OF INDIANA,
Plaintiff,

vs.

JOANNE LIMBACH, TAX COMMISSIONER, *et. al.,*
Defendants.

JUDGE CRAWFORD

DECISION

FINDINGS OF FACT

(1) The Court has adopted as its findings, the "Amended Agreed Finding of Fact" submitted by all parties on April 10, 1984. In addition, the Court has adopted plaintiff's four additional findings of fact and defendants' additional finding of fact submitted on April 10, 1985. Further, the Court will take judicial notice of the plaintiff's application for Registration of Foreign Limited Partnership and the Report of Use of Fictitious Name, each of which was filed after the hearing date of the case.

(2) Additional Finding by the Court.

Revised Code Section 5735.145 was enacted in 1981 which granted the tax credit to dealers for the use of ethanol. The only meaningful change that was made in the legislation was effective January 1, 1985, and is the

reciprocal tax credit provision which is the subject of this litigation.

CONCLUSIONS OF LAW

(1) *Plaintiff has standing to challenge the constitutionality of Rev. Code Section 5735.145(B).*

In general, standing requires that the party seeking relief suffer injury in fact and that the interest sought to be protected be within the zone of interests protected by the constitutional provision invoked. (*Valley Forge Christian College v. Americans United for Separation of Church and State* (1982) 454 U.S. 464, 472-73). Even though it is desirable that the party seeking to attack taxation legislation be a taxpayer (*Board of Education v. Guy* (1901) 64 Ohio St. 434, *State ex rel Bowers v. Maumee Watershed Conservency District* (1954) 98 Ohio App. 111), it is not necessary in all cases. The United States Supreme Court, in a case in which the tax commissioner argued that stock exchanges do not have standing to question the constitutionality of a transfer tax statute, held:

> "The exchanges are asserting their right to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right. Thus, they are 'arguably within the zone of interests to be protected [by the constitution]'"
>
> [*Boston Stock Exchange v. State Tax Comm'r* (1977) 429 U.S. 318 at p. 320]

Similiarly, the Court held that wholesalers have standing to attack a discriminatory tax if it has an "adverse competitive impact on their business." (*Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. ——, 82 L. Ed. 2d 200 at p. 207).

The Florida Supreme Court was confronted with a case very similiar to the one before this Court. In *Miller v.*

Publicker Industries, Inc., No. 65, 839 (Oct. 11, 1984), the Court held that an out-of-country supplier of ethanol could challenge Florida's ethanol tax-credit legislation which precluded foreign suppliers from the applicability of the ethanol tax-credit.

> A party may challenge the constitutionality of a statute after showing that enforcement of the statute will injuriously affect the plaintiff's personal property rights . . . . In the present case Publicker presented evidence that, due to removal of the exemption on gasohol with foreign source alcohol, blender/distributors of gasohol in Florida either will not purchase or will require a substantial reduction in price before purchasing foreign ethyl alcohol. Publicker demonstrated the devastating effect this statute has had on its business. It must continue to pay fixed expenses while unable to sell its alcohol in Florida at an economically viable price. The legislature may not protect a tax statute from constitutional review merely by ensuring that someone other than the party whose business is adversely affected must pay the tax . . . . We therefore agree with the trial court's finding that Publicker had standing to challenge [the statute] . . . .
>
> [*Miller v. Publicker Industries, Inc., supra*]

In the case at bar, failure of the plaintiff to have its ethanol subject to the tax credit will have a major impact on its business in Ohio. If defendants' arguments are sustained, the legislation could not be challenged. In *Guy, supra*, and *Maumee Watershed, supra*, there were alternate routes for the plaintiffs to follow to challenge the tax. In this case, there are not alternate routes for the plaintiff to follow. In all likelihood, no dealer will purchase plaintiff's product because it is not subject to the tax credit. In addition, if a dealer does purchase the plaintiff's ethanol and then challenges the legislation, it is possible that it would not have standing to raise either the Equal Protection or the Commerce Clause arguments of plaintiff.

Defendants assert that *Rev. Code* Section 5703.38 precludes plaintiff from seeking the injunction against the tax commissioner. This action seeks a declaratory judgment and an injunction pursuant to *Rev. Code* Section 2723.01. The anti-injunction provisions of *Rev. Code* Section 5703.38 deals with cases in which the Department of Taxation has issued an order or a determination regarding a particular taxpayer from which the taxpayer has alternative remedies to pursue a challenge. This Court does not believe that the legislature intended that *Rev. Code* Section 5703.38 supercedes *Rev. Code* Section 2723.01 and *Rev. Code* 2721.03 in that it precludes all injunctions against all tax legislation.

(2) *Revised Code Section 5735.145(B) is presumed constitutional unless proven unconstitutional beyond a reasonable doubt.*

> "The judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy . . . ."
>
> [New Orleans v. Dukes, 42 U.S. at 303]

Because of our role as interpreters of legislation, rather than makers, legislation is given a great presumption of constitutionality. The Ohio Supreme Court held, in *State, ex rel, Swetland v. Kinney*, 1982 69 Ohio St. 2d 567:

> "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality unless such enactments are clearly unconstitutional beyond a reasonable doubt.
>
> * * * *
>
> "The legislative judgment in this behalf will not be nullified except when it clearly appears that there has been a gross abuse of such discretion in un-

doubted violation of some state or federal constitutional provision."

[*Swetland, supra* at p. 574]

(3) *Revised Code Section 5735.145(B) does not violate the Privileges and Immunities Clause of the United States Constitution.*

The Plaintiff is an Indiana limited partnership. It is not a citizen for purposes of the Privileges and Immunities Clause of the United States Constitution. (*Western and Southern Life Ins. Co. v. State Board of Education* (1981) 451 U.S. 648, and *Hemphill v. Orloff* (1928) 277 U.S. 537.

(4) *Revised Code Section 5735.145(B) does not violate the Equal Protection Clause of the United States Constitution.*

Both sides have directed this Court to the March 26, 1985, decision of the United States Supreme Court in *Metropolitan Life Insurance Co. v. Ward,* —— U.S. ——, No. 83-1274. In that case the Supreme Court found that Alabama's domestic preference tax, which taxes out-of-state insurance companies at a higher rate than domestic insurance companies, violates the Equal Protection Clause of the United States Constitution. The case did not involve a Commerce Clause attack because Congress has exempted insurance companies from Commerce Clause restrictions pursuant to the McCarran-Ferguson Act, 15 USC Section 1011.

It is obvious from reading the majority and the dissent that the *Ward, supra,* case was a close call for the Court. It is also clear that this is the most recent statement of the Court on the subject of Equal Protection and is binding on this Court.

In *Ward, supra,* the Alabama legislature granted a preference to its domestic insurance companies by imposing a lower gross premium tax on domestic companies

than it did for out-of-state companies. In general out-of-state companies paid three or four times as much gross premium taxes as did its domestic competitors. Out-of-state companies could reduce the differential by investing their assets in domestic assets and securities; however, in no event could the out-of-state companies ever reduce their tax rate to that of the domestic companies. The Court found that the *sole* purpose of the legislation was "to favor domestic industry within the state, no matter what the cost to foreign corporations also seeking to do business there." [at p. 8 of the Opinion].

In citing *Western & Southern Life Ins. Co. v. State Board of Equalization of Calif* (1981) 451 U.S. 648, the Court in *Ward, supra,* established the test to be used in cases in which out-of-state corporations are discriminated by way of tax legislation.

> "'. . . whatever the extent of a state's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relationship to a legitimate state purpose.'"
>
> [at p. 5 of the Opinion]

In deciding whether a particular piece of legislation complies with the Equal Protection Clause, a Court must first determine the legislature's purpose in enacting the legislation. "If the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." (at p. 11 of the Opinion). Further, the Court cited *United States v. Carolene Products Co.* (1938) 304 U.S. 144 at p. 154, and held "if the purpose is legitimate, equal protection challenge may not prevail so long as the question of ra-

tional relationship is 'at best debatable.'" "(The dissent agreed with the foregoing test. See Dissent, p. 11).

In the case at bar, it is clear from the Findings of Fact that the original 1981 legislation had several legitimate purposes. (Findings, 10, 11). All parties agree that tax credits for the use of ethanol is a legitimate state purpose and imposes only a minor burden on gasoline producers. However, it is not agreed that the 1985 reciprocal tax credit amendment carries with it the legitimate purposes of the original act. Plaintiff argues that the only purpose to the amendment is to favor in-state producers by discriminating against out-of-state producers as in *Ward, supra.* Defendants argue that while in-state producers may receive a benefit, the purpose of the legislation is to keep the air clean around Ohio and to encourage other state legislatures to pass similar tax credit legislation. (Or not to abolish existing legislation). The Supreme Court in *Western and Southern, supra,* recognized that discriminatory tax legislation can have a legitimate purpose if it is intended to influence the policies of other state legislatures. The Court in *Ward* held, at p. 8 of the Opinion:

> "Alabama has made no attempt, as California did, to influence the policies of other states in order to enhance its domestic companies' ability to operate interstate; rather, it has erected barriers to foreign companies who wish to do interstate business in order to improve its domestic insurers' ability to compete at home."

In *Ward, supra,* as in *Miller, supra, Bacchus Imports, supra,* and *Boston Stock Exchange,* there was absolute discrimination against out-of-state producers in their respective tax legislation. When legislation creates absolute favoritism in favor of domestic companies the purpose is inherently suspect. (*Ward,* dissent, p. 11). In the case at bar, there is no absolute favoritism. The tax

credit is available to all dealers in Ohio; and if an out-of-state producer has reciprocal tax-credit legislation, dealers receive the tax credit on all ethanol sold.

The Court thus finds that:

a. The legislation is given a strong presumption of constitutionality;

b. The plaintiff will be significantly damaged by the effect of the legislation;

c. The legislature's purpose of promoting domestic industry *and* to affect the policies of other states to grant reciprocal tax credits, is a legitimate purpose—at least debatably;

d. The legislation bears a rational relation to its legitimate purpose.

(5) *Revised Code Section 5735.145(B) does not violate the Commerce Clause of the United States Constitution.*

The Commerce Clause is intended to protect interstate commerce from restrictive legislation rather than protecting individuals. (As in the case with the Equal Protection Clause—See *Ward, supra,* at p. 11 of the Opinion).

This Court has previously held that the purpose of the legislation in enacting *Rev. Code* 5735.145(B) was legitimate. The Court has further held that the plaintiff will receive a economic hardship as a result of the legislation; however, this Court has not found that the legislation will impose a significant burden on interstate commerce. There is no absolute ban on the purchase and/or sale of plaintiff's ethanol as a result of the legislation. Plaintiff is not precluded from doing business in Ohio; nor is any other producer. Plaintiff is presently the only ethanol producer which is indirectly affected by the legislation.

Plaintiff cites the *Miller, supra, Bacchus, Imports, supra, Great A & P, supra,* and *Deukmejian v. Nat'l Meat Assoc.,* 53 U.S.L.W. (January 7, 1985, No. 84-720)

cases for the proposition that a state cannot favor in-state businesses to the detriment of out-of-state busineses. This is not totally accurate. A state may have a discriminatory tax if such tax does not significantly burden interstate commerce.

The tax legislation does not ban the sale of products in Ohio manufactured in other states not having a reciprocal provision as in *Great A & P, supra.* The tax does not grant a credit solely for Ohio produced ethanol as in *Bacchus, Imports, supra.* The tax does not tax the use of ethanol differently depending on whether the ethanol was produced in Ohio or out of Ohio as in *Deukmejian, supra,* and it does not apply a direct commercial advantage to all Ohio producers over all out-of-state producers as in *Miller, supra, Boston Stock Exchange, supra.*

The Supreme Court has consistently held:

> ". . . under our constitutional scheme the states retain 'broad power to legislate protection for their citizens in matters of local concern. Such as public health . . ., and that not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the state.
>
> [*Great A & P, supra* at p. 371].
>
> * * * *
>
> "A nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the state's legitimate purposes does such a regulation violate the Commerce Clause.
>
> [*Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. at p. 474].

The two state court cases in which courts have struck down ethanol tax legislation on Commerce Clause grounds

are *Archer Daniels Midland Co. v. State,* 315 N.W. 2d 597 (Minn, 1982) and *Miller, supra.* In both cases no tax credit was given for any out-of-state (out of country, in *Miller*) produced ethanol. Even though the plaintiffs in those cases could sell their products in the respective states, the burden on interstate commerce was severe because there was no set of facts which could make them eligible for the exemption. In the case at bar, plaintiff is the only producer affected and it would not have been affected if its state legislature had not abolished its tax credit. It could be said that the Indiana legislature created the hardship to the plaintiff as much as the Ohio legislature did.

This Court is not holding that all reciprocal tax credit legislation is a valid exercise of state power. If the credit legislation affected all out-of-state producers, and/or if the legislation created a scheme that made it impossible for all producers to compete with Ohio companies, the result may be different. This is a very close case (on all issues except the Privileges and Immunities Clause). Remembering that the legislation receives a strong presumption in favor of its constitutionality, the Court holds that it does not violate the Commerce Clause of the United States Constitution.

Dale A. Crawford
DALE A. CRAWFORD
Judge

COPIES TO:

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Attorney for Plaintiff

Richard C. Farrin, Esq.
Attorney General's Office
Attorney for Joanne Limbach
and Mary Ellen Withrow

David C. Crago, Esq.
Attorney for South Point Ethanol

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Case No. 85CV-02-712

NEW ENERGY COMPANY OF INDIANA,
Plaintiff,

vs.

JOANNE LIMBACH, TAX COMMISSIONER, *et. al.,*
Defendants.

JUDGE CRAWFORD

JUDGMENT ENTRY

Judgment is hereby rendered in favor of the Defendants in accordance with this Court's Decision of April 23, 1985.

The Court finds that *Revised Code* Section 5735.145 does not violate the Privileges and Immunities, the Equal Protection or the Commerce Clauses of the United States Constitution. Case Dismissed.

Costs to Plaintiff.

DATE:

Dale A. Crawford
DALE A. CRAWFORD
Judge

APPROVED:

John K. Lines, Esq.
Attorney for Plaintiff

Richard C. Farrin, Esq.
Attorney General's Office
Attorney for Joanne Limbach
and Mary Ellen Withrow

David C. Crago, Esq.
Attorney for South Point Ethanol

R.C. § 5735.145(B)

(B) The qualified fuel otherwise eligible for the qualified fuel credit shall not contain ethanol produced outside Ohio unless the tax commissioner determines that the fuel claimed to be eligible for credit contains ethanol produced in a state that also grants an exemption, credit or refund from such state's motor vehicle fuel excise tax or sales tax for similar fuel containing ethanol produced in Ohio; provided however, that such credit shall not exceed the amount of the credit allowable for qualified fuel containing ethanol produced in Ohio.

STATE OF TENNESSEE

[SEAL]

Office of the Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

June 27, 1983

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Mrs. Martha B. Olsen, Commissioner
Department of Revenue
Andrew Jackson SO Bldg.
Nashville, Tennessee 37242

Dear Commissioner Olsen:

You have requested the opinion of this office with respect to the following matters:

QUESTIONS

1. Is Section 9, Chapter 911, Public Acts of 1982 unconstitutional because it mandates different tax rates on gasohol, depending on whether the gasohol was produced in Tennessee, in a state which provides gasohol tax relief, or in a state which does not provide gasohol tax relief?

2. If Section 9, Chapter 911, Public Acts of 1982 is constitutional, how should the Department of Revenue

calculate the tax on gasohol imported into Tennessee from states which provide less tax relief than Tennessee?

OPINIONS

1. Section 9, Chapter 911, Public Acts of 1982 is unconstitutional because it violates the Commerce Clause of the United States Constitution under the holding by the United States Supreme Court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).

2. Your second question is rendered moot by our opinion in connection with the first question.

ANALYSIS

Chapter 911, Public Acts of 1982 amends those provisions of the Tennessee Code which deal with the gasoline tax by providing for a special tax scheme for gasohol. Section 9 of Chapter 911 and its constitutional implications are the focus of our inquiry. Section 9 provides:

> The provisions of this Act shall apply to gasohol manufactured from ethyl alcohol manufactured in Tennessee and shall apply to gasohol manufactured in any state which reduces the rate of taxation or exempts from its motor fuel tax gasohol manufactured from ethyl alcohol manufactured in Tennessee, provided that any gasohol imported into Tennessee or any gasohol manufactured from ethyl alcohol imported into Tennessee shall be taxed at the same rate and in the same manner as gasohol manufactured from ethyl alcohol manufactured in Tennessee, regardless of the rate of taxation on gasohol or ethyl alcohol in the state from which such gasohol or ethyl alcohol is imported, except that in no case shall the amount of tax relief granted gasohol or ethyl alcohol imported into Tennessee exceed the amount of relief granted by the exporting state.

Thus this section affords the tax relief granted by Chapter 911 to all "in state" gasohol. Gasohol imported from states which do not provide gasohol tax relief do not receive Tennessee tax relief. Gasohol imported from states which do provide gasohol tax relief is afforded Tennessee tax relief except that such Tennessee tax relief is reduced where the tax relief provided by the exporting state is less than the Tennessee tax relief.

Article 1, Section 8, Clause 3, the "Commerce Clause," of the United States Constitution provides:

> The Congress shall have power to . . . regulate commerce . . . among the several states, . . .

The purpose of the Commerce Clause was "to create an area of free trade among the states." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944). States are prohibited from unduly burdening interstate commerce with discriminatory taxes and regulations. *Freeman v. Hewit*, 329 U.S. 249 (1946). *See also Halliburton Oilwell Co. v. Reily*, 373 U.S. 64 (1963); *Nippert v. Richmond*, 327 U.S. 416 (1946); *I.N. Darnell & Son v. Memphis*, 208 U.S. 113 (1908); *Guy v. Baltimore*, 100 U.S. 434 (1880); *Welton v. Missouri*, 91 U.S. 275 (1876).

The most recent pronouncement by the United States Supreme Court with respect to Commerce Clause restrictions on state taxation is *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977). In that case the court considered a New York tax on stock transfers, which tax discriminated on the basis of whether or not stock sales were made in New York by taxing New York sales at a preferential rate. The court invalidated the New York tax, holding that the tax violated the Commerce Clause of the United States Constitution. The court stated:

> [T]he fundamental principal that we find dispositive of this case . . . [is]: [n]o state, consistent with the Commerce Clause may impose a tax which

> discriminates against interstate commerce . . . by providing a direct commercial advantage to local businesses.

Id. at 330.

The *Boston Stock Exchange* case would appear to prohibit a tax scheme such as that set forth in Chapter 911. The Tennessee tax on imported gasohol varies according to the gasohol taxation structure in the exporting state. The reciprocity provision does not mitigate the possibility of discrimination against interstate commerce because gasohol manufacturers do not dictate their states' taxation structures. A gasohol manufacturer from a state whose legislature has not directed gasohol tax relief will be taxed by Chapter 911 on Tennessee gasohol imports at a higher rate than a manufacturer from Tennessee or a state which does afford gasohol tax relief. Such discriminatory taxation has the effect of interfering with interstate commerce by providing a direct commercial advantage to local gasohol manufacturers and to those gasohol manufacturers in states which have gasohol tax relief. This discrimination against interstate commerce is precisely what the *Boston Stock Exchange* decision prohibits. It is the opinion of this office, therefore, that Section 9, Chapter 911, Public Acts of 1982 is unconstitutional.

Sincerely,

/s/ William M. Leech, Jr.
WILLIAM M. LEECH, JR.
Attorney General

/s/ William B. Hubbard
WILLIAM B. HUBBARD
Chief Deputy Attorney General

/s/ Gregory L. Nelson
GREGORY L. NELSON
Assistant Attorney General

EXHIBIT A

[SEAL]

NEIL F. HARTIGAN
Attorney General
State of Illinois
Springfield
62706

June 20, 1985

Honorable William A. Marovitz
Illinois State Senator
105-A State Capitol
Springfield, Illinois 62706

Dear Senator Marovitz:

I have your letter wherein you inquire regarding the constitutionality of Senate Bill 254, introduced in the Eighty-fourth General Assembly. Because of the nature of your question, I do not believe that an official opinion of the Attorney General is necessary. I will, however, comment informally upon your request.

If enacted, Senate Bill 254 would amend section 3 of the Use Tax Act (Ill. Rev. Stat. 1985 Supp., ch. 120, par. 439.3) and impose a tax upon gasohol manufactured outside the State of Illinois at a rate different from that produced within the State of Illinois unless the State of production grants an exemption, credit, or refund from that jurisdiction's fuel excise tax, sales tax, or similar tax to gasohol produced in the State of Illinois. Senate Bill 254 provides in part as follows:

> "* * * [W]ith respect to gasohol in which the ethanol has been distilled in Illinois, such [use] tax shall be imposed at the rate of 0% up to and including December 31, 1983; and at the rate of 1% from January 1, 1984 up to and including June 30, 1985; and at the rate of 1%, plus an additional 1% for each one cent reduction in the Federal Excise Tax on a gallon of gasohol occurring after June 30, 1985, from July 1, 1985 up to and including December 31, 1992; and at the rate of 5% thereafter. If the Department of Revenue certifies that another jurisdiction outside the State of Illinois provides an exemption, credit, or refund from that jurisdiction's motor fuel excise tax, sales tax or similar tax that is applicable to gasohol which contains denatured ethanol distilled in Illinois, then gasohol containing ethanol distilled in the other jurisdiction and purchased on or after July 1, 1985, shall be eligible for the exemption provided in this Section only to the level of exemption, credit, or refund that gasohol containing ethanol distilled in Illinois would receive in such other jurisdiction, but not to exceed the level of exemption provided for gasohol containing ethanol distilled in Illinois. All denatured ethanol for blending into gasohol which is paid for and in Illinois storage facilities prior to July 1, 1985, shall qualify for the exemption available under this Section for gasohol containing ethanol distilled in Illinois. The Department shall maintain gallonage records for exemptions claimed on gasohol sold at retail which qualify under this Act. * * *"

It appears that Senate Bill 254 is constitutionally infirm in that it violates the Commerce Clause of the United States Constitution (U.S. Const., art. I, § 8, cl. 3), which provides as follows:

> "The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *;

* * * *

The purpose of the Commerce Clause was to create an area of free trade among the States. The Commerce Clause not only authorizes Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force creates an area of trade free from interference by the States. (*Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, 97 S. Ct. 599, 606.) The Commerce Clause acts as a limitation upon States in encouraging domestic business and industry by imposing a discriminatory tax upon interstate commerce. (*Bacchus Imports, Ltd. v. Dias* (1984), —— U.S. ——, 104 S. Ct. 3049, 3056-57.) In *Maryland v. Louisiana* (1981), 451 U.S. 725, 101 S. Ct 2114, wherein a Louisiana statute, which imposed a tax upon natural gas brought into the State of Louisiana for processing, eventually to be sold to out-of-state consumers, was struck down, the Supreme Court held as follows:

> "* * * Prior case law has established that a state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way. [Citations.] *The State's right to tax interstate commerce is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.* [Citation.] One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' [Citations.] This antidiscrimination principle 'follows inexorably from the basic purpose of the Clause' to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. [Citations.]
>
> * * * *
>
> (Emphasis added.) *Maryland v. Louisiana* (1981), 451 U.S. 725, 101 S. Ct. 2114, 2133.

In *Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, 97 S. Ct. 599, certain stock exchanges located outside the State of New York brought an action challenging a New York State statute which imposed a heavier transfer tax on out-of-state securities transactions than securities transactions within the State of New York. The intent of the New York legislature in imposing a heavier tax burden on out-of-state securities transactions over intra-state transactions was to afford a degree of economic protection to the New York based stock exchanges. Ruling that the New York tax was invalid, the Supreme Court held:

> * * * *
>
> * * * No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' * * *
>
> * * * *
>
> * * * We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.
>
> * * * *
>
> *Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, 97 S. Ct. 599, 607-10.

In *Bacchus Imports, Ltd. v. Dias* (1984), —— U.S. ——, 104 S. Ct. 3049, the Supreme Court considered the constitutionality of a liquor tax imposed by the State of Hawaii on the sales of liquor. The sale of certain locally produced liquor, however, was exempted from the tax.

The State of Hawaii posited that the purpose of the preferred treatment for local products was not to discriminate against interstate commerce but to promote the local industry. As in *Boston Stock Exchange v. State Tax Commission*, the court struck down the Hawaii tax as unlawful economic protectionism, holding as follows:

* * * *

> * * * [W]e need not guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry. Likewise, the effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect.

* * * *

> *Bacchus Imports, Ltd. v. Dias* (1984), —— U.S. ——, 104 S. Ct. 3049, 3056.

It appears that Senate Bill 254, if enacted, would impose a tax which discriminates against interstate commerce. The exemption contained therein applies only to ethanol produced in the State of Illinois and to ethanol produced in other jurisdictions which exempt ethanol produced in Illinois from their taxes on gasohol. Consequently, a gasohol manufacturer from a State whose legislature does not provide for gasohol tax relief would be taxed at a higher rate than a manufacturer from Illinois or a State which does afford gasohol tax relief. Such a discriminatory tax would provide a direct economic advantage to Illinois gasohol producers and to those producers from other States benefiting from the reciprocity provision and, hence, would constitute an undue interference with interstate commerce. Accordingly, it appears that Senate Bill 254 is unconstitutional.

This is not an official opinion of the Attorney General. If I can be of any further assistance, please advise.

Very truly yours,

/s/ Shawn W. Denney
SHAWN W. DENNEY
Assistant Attorney General
Chief
Opinions Division

SWD:CRS:vl

IN THE SUPREME COURT OF OHIO

Case No. 86-784

NEW ENERGY OF INDIANA,
Appellant,

—vs.—

JOANNE LIMBACH, TAX COMMISSIONER OF OHIO, *et al.*,
Appellees.

NOTICE OF APPEALS TO THE
SUPREME COURT OF THE UNITED STATES

[Filed Oct. 9, 1987]

Notice is hereby given that New Energy of Indiana, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment and mandate of the Supreme Court of the State of Ohio, entered in this action on September 2, 1987, affirming the judgment of the Court of Appeals of Franklin County, Ohio, upholding the constitutionality of Ohio Revised Code § 5735.145.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ David J. Young
DAVID J. YOUNG
MURPHEY, YOUNG & SMITH
Legal Professional Association
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Trial Attorney for Appellant
New Energy of Indiana

Of Counsel:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by regular United States mail, first-class, postage prepaid, upon Richard C. Farrin, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215; David C. Crago, Esq., 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215; and Patricia M. Wilson, Esq., 539 South Main Street, Findlay, Ohio 45480 on this 9th day of October, 1987. All parties required to be served have been served.

/s/ David J. Young
DAVID J. YOUNG